Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

JOHN TELLO and TAMARA TELLO,
Plaintiffs,

JOHN TELLO
Appellant-Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee-Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI

JOHN TELLO, PRO SE
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Questions Presented

Due Process, Evidence—Compelled Agreement

STATUTORY CHALLENGE

1. Does TCR 91(f) violate public policy?

2. Can any of the Secretary, the Tax Court or the appellate court compel the accounting method?

Summary Judgment, Evidence

3. Are settlement discussions proper summary judgment evidence?

Summary Judgment, Ethics—Attorney as Witness

4. Did BENFORD violate ABA Rule 3.7?

Due Process, Evidence, Ethics, *Ballard* "Secret Rulings"

5. Did KROUPA issue "secret rulings?"

6. Should KROUPA have self-recused? If so, is the *Liljeberg* standard satisfied?

7. Does IRC § 7459(d) have one sentence or two?

8. Is TELLO entitled to § 6673 penalties?

Parties

The parties to the court of appeals judgment sought to be reviewed are the following:

Appellant
JOHN TELLO, *pro se*
Per FED. R. APP. P. 3 also for TAMARA TELLO

Appellee
COMMISSIONER OF INTERNAL REVENUE
(thus SECRETARY OF THE TREASURY ("Secretary"),
and UNITED STATES OF AMERICA)

EILEEN J. O'CONNOR, Assistant AG
KENNETH L. GREENE, DOJ
ANTHONY T. SHEEHAN, DOJ (sole signatory)

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Appendix A (with separate Table of Contents)

Citations to decisions below

None yet. Fifth Circuit granted, over Tello's objection, DOJ's motion to publish.

Jurisdiction

(i) Date Judgment Entered
18 April 2005 [1] [+90: Sunday, 17 July 2005]

(ii) Rehearing, Extension None

(iii) Rule 12.5 Cross-appeal N/A

(iv) Statutes, Jurisdiction
Review by certiorari of decision by court of appeals, 28 U.S.C. §§ 1254(1), 2101(c).

(v) Regarding notice of statutory challenge, Rule 29.4(b)
Tello challenged TCR 91 in the Tax Court and on appeal. It is neither an Act of Congress nor a State statute. Tello's objection to TCR 91 is but one of the documents "unfiled" in the Tax Court's "secret ruling" episode; Tello supplemented the Record on appeal.

Non-Argument Calendar Preferred

Oral argument is not expected to aid in the resolution of these issues.

[1] Apropos postmark of 19 April 2005.

Key Statutory Language

Tax Court Rules

Rule 91.

RULE 91. STIPULATIONS FOR TRIAL

(a) Stipulations Required:

(1) *General:* [Scope] The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(2) *Stipulations To Be Comprehensive:* [Discovery rendered irrelevant, generally] The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the scope of subparagraph (1) must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

(b) Form: Stipulations required under this Rule shall be in writing, signed by the parties thereto or by their counsel, and shall observe the requirements of Rule 23 as to form and style of papers, except that the stipulation shall be filed with the Court in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of stipulation in any respect and which the parties intend to place before the Court, shall be annexed to or filed with the stipulation. The stipulation shall be clear and concise. Separate items shall be stated in separate paragraphs, and shall be appropriately lettered or numbered. Exhibits attached to a stipulation shall be numbered serially; i.e., 1, 2, 3, etc. The exhibit number shall be followed by "P" if offered by the petitioner, e.g., 1–P; "R" if offered by the respondent, e.g., 2–R; or "J" if joint, e.g., 3–J.

(c) Filing: Executed stipulations prepared pursuant to this Rule, and related exhibits, shall be filed by the parties at or before commencement of the trial of the case, unless the Court in the particular case shall otherwise specify. A stipulation when filed need not be offered formally to be considered in evidence.

(d) Objections: [Trial alone is available to deal with full scope of stipulations] Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to a stipulated matter made at the commencement of the trial or for good cause shown made during the trial.

(e) Binding Effect: A stipulation shall be treated, to the extent of its terms, as a conclusive admission by the parties to the stipulation, unless otherwise permitted by the Court or agreed upon by those parties. The Court will not permit a party to a stipulation to qualify, change, or contradict a stipulation in whole or in part, except that it may do so where justice requires. A stipulation and the admissions therein shall be binding and have effect only

in the pending case and not for any other purpose, and cannot be used against any of the parties thereto in any other case or proceeding.

(f) Noncompliance by a Party:

(1) *Motion To Compel Stipulation:* If, after the date of issuance of trial notice in a case, ***a party has refused or failed to confer with an adversary with respect to entering into a stipulation in accordance with this Rule***, or ***a party has refused or failed to make such a stipulation of any matter within the terms of this Rule***, the party proposing to stipulate may, at a time not later than 45 days prior to the date set for call of the case from a trial calendar, file a motion with the Court for an order directing the delinquent party to show cause why the matters covered in the motion should not be deemed admitted for the purposes of the case.

The motion shall

(A) show with particularity and by separately numbered paragraphs each matter which is claimed for stipulation;

(B) set forth in express language the specific stipulation which the moving party proposes with respect to each such matter and annex thereto or make available to the Court and the other parties each document or other paper as to which the moving party desires a stipulation;

(C) set forth the sources, reasons, and basis for claiming, with respect to each such matter, that it should be stipulated;

(D) show that opposing counsel or the other parties have had reasonable access to those sources or basis for stipulation and have been informed of the reasons for stipulation; and

(E) show proof of service of a copy of the motion on opposing counsel or the other parties.

(2) *Procedure:* Upon the filing of such a motion, an order to show cause as moved shall be issued forthwith,

unless the Court shall direct otherwise. The order to show cause will be served by the Clerk, with a copy thereof sent to the moving party. Within 20 days of the service of the order to show cause, the party to whom the order is directed shall file a response with the Court, with proof of service of a copy thereof on opposing counsel or the other parties, showing why the matters set forth in the motion papers should not be deemed admitted for purposes of the pending case. The response shall list each matter involved on which there is no dispute, referring specifically to the numbered paragraphs in the motion to which the admissions relate. Where a matter is disputed only in part, the response shall show the part admitted and the part disputed. Where the responding party is willing to stipulate in whole or in part with respect to any matter in the motion by varying or qualifying a matter in the proposed stipulation, the response shall set forth the variance or qualification and the admission which the responding party is willing to make. Where the response claims that there is a dispute as to any matter in part or in whole, or where the response presents a variance or qualification with respect to any matter in the motion, the response shall show the sources, reasons, and basis on which the responding party relies for that purpose. The Court, where it is found appropriate, may set the order to show cause for a hearing or conference at such time as the Court shall determine.

(3) *Failure of Response:* If no response is filed within the period specified with respect to any matter or portion thereof, or if the response is evasive or not fairly directed to the proposed stipulation or portion thereof, that matter or portion thereof will be deemed stipulated for purposes of the pending case, and an order will be issued accordingly.

(4) *Matters Considered:* Opposing claims of evidence will not be weighed under this Rule unless such evidence

is patently incredible. Nor will a genuinely controverted or doubtful issue of fact be determined in advance of trial. The Court will determine whether a genuine dispute exists, or whether in the interests of justice a matter ought not be deemed stipulated.

TCR 91 (emphasis added).

Internal Revenue Code

Section 7459. Reports and decisions

(d) EFFECT OF DECISION DISMISSING PETITION.—***If*** a petition for a redetermination of a deficiency has been filed by the taxpayer, **[*then*]** a decision of the Tax Court dismissing the proceeding shall be considered as its decision that the deficiency is the amount determined by the Secretary. An order specifying such amount shall be entered in the records of the Tax Court ***unless the Tax Court cannot determine such amount from the record in the proceeding***, *or unless the dismissal is for lack of subject matter jurisdiction.*

IRC § 7459(d) (emphasis added).

Section 6673. Sanctions and costs awarded by courts

(a) Tax court proceedings

(1) Procedures instituted primarily for delay, etc.

Whenever it appears to the Tax Court that

(A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,

(B) the taxpayer's position in such proceeding is frivolous or groundless, or

(C) the taxpayer unreasonably failed to pursue available administrative remedies,

the Tax Court, in its decision, may require the

taxpayer to pay to the United States a penalty not in excess of $25,000.

(2) Counsel's liability for excessive costs

Whenever it appears to the Tax Court that any attorney or other person admitted to practice before the Tax Court has multiplied the proceedings in any case unreasonably and vexatiously, the Tax Court may require

(A) that such attorney or other person pay personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct, or

(B) if such attorney is appearing on behalf of the Commissioner of Internal Revenue, that the United States pay such excess costs, expenses, and attorneys' fees in the same manner as such an award by a district court.

(b) Proceedings in other courts

(1) Claims under section 7433

Whenever it appears to the court that the taxpayer's position in the proceedings before the court instituted or maintained by such taxpayer under section 7433 is frivolous or groundless, the court may require the taxpayer to pay to the United States a penalty not in excess of $10,000.

(2) Collection of sanctions and costs

In any civil proceeding before any court (other than the Tax Court) which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, any monetary sanctions, penalties, or costs awarded by the court to the United States may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

(3) Sanctions and costs awarded by a court of appeals

In connection with any appeal from a proceeding in the Tax Court or a civil proceeding described in paragraph (2), an order of a United States Court of Appeals or the Supreme Court awarding monetary sanctions, penalties

or court costs to the United States may be registered in a district court upon filing a certified copy of such order and shall be enforceable as other district court judgments. Any such sanctions, penalties, or costs may be assessed by the Secretary and, upon notice and demand, may be collected in the same manner as a tax.

26 U.S.C.A. § 6673 (West 2002).

Citations to additional authority

Tax Court discovery policy. TCRs 51, 70(a)(1), 70(a)(2), 90 and 100.

26 U.S.C.A. § 7458 (West 2002) (*taxpayer* read also to mean *petitioner(s)*).

28 U.S.C.A. § 455(a) (West 1993 & Supp. 2004).

28 U.S.C. § 3002 (2000).

31 U.S.C. §§ 321(d), 5101, 5102, 5103 (2000).

42 U.S.C.A. § 1320b-9(k) (West 2003).

Statement of the Case

Trial Court Jurisdiction

26 U.S.C.A. § 7442 (68A Stat. 879 (1954)).

The Tax Court's maiden voyage (by all indications)

Unconscionable claims!! Who wouldn't have sued?!

Year	TAMARA TELLO		JOHN TELLO	
	Notice of Deficiency	"Judgment"	Notice of Deficiency	"Judgment"
1996	58,117.	8,379.	130,840.	0.
1997	9,888.	10,561.	**1,004,552.**	**0.**
1998	14,946.	9,267.	2,720.	600.
1999	25,609.	13,530.	N/A*	Dismissed*
2000	51,073.	44,675.	10,822.	5,235.
Totals	159,633.	86,412.	**1,148,934.**	**5,835.**

* No Notice of Deficiency for 1999 for Tello.

Tax and divorce in Texas.

Tello and his now ex-wife filed the Tax Court petition *pro se*. Tello appealed *pro se* per FED. R. APP. P. 3 during removal of the divorce. [2] Tello's joint appeal intends to protect and preserve the community estate, which is *still* in dispute, in exactly the same way that Pollock intended to preserve the assets of Farmers' Loan & Trust in 1895.

The wife stipulated.

Under the influence of TCR 91, the wife stipulated. Taking Pollock's lead, Tello challenges her authority to deplete the community estate in this manner.

Tello's firm offer to settle—Rejected Three Times!

Tello's offer depended upon recognition of a *competent* trust accounting method, namely the one built into the Form 1041. The Commissioner rejected it three times: (1) by BENFORD, [3] (2) by KORB, who sent the certified check

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[2] No. 3:04-CV-1354-K (N.D. Tex.). Tello removed; state judge intended to compel sale of house (to pay tax lien). Divorce was finalized upon remand. (Lesson: Usually, non-*in rem* 1333 issues are not removable.)

[3] Who physically threw the paperwork back across the desk at Tello.

back to BENFORD to handle, and (3) by BENFORD, who returned the check to TELLO a second time, this time by mail. *See* Mandamus R.E. 89-91. [4] [A-82].

Discovery.

Responding to Request for Admissions, Tello admitted to the plethora of *sworn* "Balance 0.00's" and "[blanks]."

Summary Judgment.

Using the Secretary's *sworn* discovery Requests, Tello moved for summary judgment. [A-61]. Tello openly admits having self-identified as a "taxpayer" by opening a bank account. However, equally beyond factual dispute is that (A) the Secretary's *evidence* ***confesses*** "0.00" due, (B) the claimant never satisfied its threshold burden that it is, in fact, the named beneficiary, and (C) there is no competent evidence of damages, since there is no assured value due to complete lack of any monetary unit of account.

Response ordered.

KROUPA originally ordered responses due. [A-10].

Tello's Motions and Objections.

During the pendency of the summary judgment responses, Tello requested a continuance and gave formal notice of the shift of burden of proof.

KROUPA defied the law, reneged her order.

In response, KROUPA

(1) characterized the law of this state as frivolous and groundless (*"f-word" and "g-word"*),

(2) threatened Tello with sanctions if he kept arguing the law of this state,

(3) denied Tello's motion for continuance,

(4) vacated her order to respond to Tello's summary judgment motion,

(5) denied the summary judgment motion, and

(6) treated Tello's notice of shift of burden of proof as a motion, as if it were *optional*, and denied it. [A-11].

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[4] Tello's pre-trial mandamus proceeding is *In re TELLO*, No. 04-10672 (July 7, 2004 5th Cir.) (unpublished).

BENFORD's "response."

In the interim, BENFORD responded. For "evidence," he submitted (A) administrative account records, (B) settlement discussions and (C) his own expert opinion on fact and law. BENFORD (1) *is not* the custodian of records, and (2) *is* the attorney of Record. [A-95].

Tello's Reply—KROUPA's "secret rulings."

Tello objected to BENFORD's "response," asserting, e.g., relevance, foundation, parol evidence and violation of ABA Rule 3.7 (can't be a necessary witness and the attorney in same case). [A-104]. By "secret ruling," KROUPA "unfiled" Tello's Reply: "Action has been taken on motion for summary judgment." [A-16]. By another "secret ruling," KROUPA also "unfiled" Tello's Objections to TCRs 91, 121, 50 and 21 [A-14]: "No motions are pending to which the objections can be directed to. Also, no Certificate of Service on [stipulated-out co-petitioner] Tamara Tello as required by Standing Pretrial Order."

"Trial," "judgment," penalties to non-party.

With the abundant proof of lawlessness in (what's left of the) Record, and under threat of sanctions for arguing law that KROUPA swore an oath to uphold, Tello did not dignify KROUPA's kangaroo court with any appearance.

KROUPA proceeded with "trial," entering "judgment" on 8 July. (Mandamus ruling, 7 July). Tello never waived the law or his defense, so KROUPA "showed him" and awarded § 6673 penalties ... *to a non-party!* [A-4].

The Fifth Circuit went silent.

Appeal normally narrows the issues. If that's done here, we're narrowed to the "naked case." Citing no authority that allegedly supports the blanket assertion that there exist long-standing opinions telling the world that Tello's defense, i.e., the law of this state, is *"f-word" and "g-word,"* the Fifth Circuit joined the *"f-word" and "g-word"* chorus. Tello raised 32 points (mandamus and appeal combined), rendering impossible a direct connection between the appeal and the ruling.

Argument

Remedies Requested

Vacate.

Among other problems, COMMISSIONER lacks standing and has disclaimed; KROUPA has corrupted the Record, issued "secret rulings" and triggered *Liljeberg*. Thus, the "judgment" is properly vacated.

Grant Tello's summary judgment.

Summary judgment and costs are properly granted.

IRC § 6673 Penalties.

The Tax Court and DOJ owe Tello § 6673 penalties.

Overview and Summary

The Tax Court and the Fifth Circuit rather much compel discussion of the "naked case." Tello included flagrant procedural errors so as to avoid that discussion. This matter is at least as sensitive as *Arnold* (cert. granted; *judgment vacated*; remand to 11th per *Booker*).

The "naked case."

This Court taught the essence of the analysis when this issue first arose. *Pollock I*, 157 U.S. at 553-54 (bill in equity; *illegal* payments; *guilty* of breach of trust). Trust law's ancient bedrock is diamond: he who claims trust must first prove trust. Pollock prevented embezzlement.

Tax Court party alignment derives from the business model, which is practical (brilliant), but which obliterates the jurisprudence model; hence, the inordinate confusion.

The Tax Court assert that *numerous*, long-standing, published opinions, of which they cite ***none***, put all on notice that " 'taxpayer' means fiduciary" is on "the 'f'-word' list." They ***boldly*** misstate the legal reality! *See* <http://www.irs.gov/pub/irs-utl/friv_tax.pdf>; <http://www.irs.gov/irs/article/0,,id=136751,00.html>; <http://www.irs.gov/pub/irs-utl/frivolousarguments-3-14-2005.pdf>.

Sanctionable procedural errors.

IRC § 7459(d) has *two* sentences. No judgment stands without evidence. Even *with* the patented Tax Court

Brand style of "secret rulings," this Record contains no evidence supporting the "judgment." Further, if "secret rulings" are not instantaneous basis for vacating, per *Ballard*, then *Liljeberg* applies, producing the same end result. Ultimately, no one is lawfully compelled to trial in a kangaroo court. 28 U.S.C.A, § 455(a).

On one hand, the Tax Court's discovery policy should be adopted into the Federal Rules of Civil Procedure. But, on the other, per TCR 91(f), the Tax Court also purport to have authority to compel *agreements*, in abject defiance of the most foundational public policy of this state.

Perspective

When the student "hears" the professor.

The Tax Court, Secretary and DOJ have riddled Tello, as if he were Bonnie and Clyde's car, with their incessant "f-word" mantra to the point of absolute and unmitigated exhaustion of patience. On one hand, their ad-hominem-laced approach is self-blinding. Power detached from self-discipline in the Law becomes a mental disease. Have not Egypt, Canaan, Assyria, Babylon, Mede-Persia, Greece and Rome all walked that *very* same path?

On the other, in the first and second [5] directly related mandamus proceedings, and consistent with law, not one word of criticism was found. But on Tello's appeal, the "f-word" shows up, without any specificity whatsoever.

The open and frank discussion on appeal of the discipline that the Tax Court are ***more than*** asking for comes at a time of horrific and slanderously incompetent judge-bashing. Rather than *listening* to the lessons taught by the Court, the bashers claim understanding sufficient *to teach* the courts, especially this one. Do they not manifestly confess their (audience's) own ignorance, naiveté, of matters international spanning 200+ years, now? Not long ago, the political craze was lawyer-bashing. Political distraction games were already ancient

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[5] *In re Florance*, No. 04-10407 (Aug. 3, 2004 5th Cir.) (unpublished).

when practiced by the Roman Emperors. Magicians rely on distraction. But, there is no such thing as magic; have the competent jurists not exposed the tricks?

One must rely on the Court to see the "farther and wider" scope. (E.g., do the Rule changes not announce political changes?) Where any alleged fiduciary seeks guidance from a Court of competent jurisdiction, and where such is provided, it's prudent to abide by it to the fullest extent possible. *Ballard* is a very diplomatic start on the treatment to cure permanently the Tax Court's grotesque and intolerable "secret ruling" addiction.

Discussion
Due Process, Evidence—Compelled Agreement

STATUTORY CHALLENGE
1. Does TCR 91(f) violate public policy?

Declaratory relief would solve the problem.
Raised in Points 13 and 28.

Per TCR 91(f), the Tax Court claim to have authority to compel a party to *stipulate,* i.e., to *agree* to facts to be used as *admission* evidence. *See* TCR 143 (FED. R. EVID. apply); FED. R. EVID. 801(d)(2) (admissions). Where a party refuses to agree, the Tax Court deems the matter *stipulated*, i.e., *agreed*, thereby creating "evidence," *see* TCR 91(c), via judicially compelled admission.

A Request for Admissions is one thing. A compelled agreement is *very* much another. Since TCR 91 is key to the Tax Court's "Standing Pretrial Order," and to "trial," and since TCR 91(f) is facially repugnant to public policy, it is proper subject of declaratory relief, generally; hence Tello's direct and overt objection. But, KROUPA "unfiled" Tello's objection, per the Tax Court's "secret ruling" addiction. *See Ballard.* The Fifth Circuit went silent.

DOJ's Brief, pp.5-8, which myopically blasts away at *Tello's* refusal to stipulate (a *two*-way street in *any* other

court), re-proclaims the TCR 91(f) environmental coercion.

The wife's stipulation also raises TCR 91(f).

The second path to the TCR 91(f) issue is through the wife's stipulation. No stipulation escapes the cattle prod of the TCR 91(f) *deemed stipulations* for not stipulating.

DOJ's objection—her stipulation waived appeal.

In this context, DOJ raises a threshold question: Can Tello appeal the "judgment" against the wife? "8. [The parties agree] That respondent and petitioner Tamara A. Tello waive the right to appeal any issues agreed to in this stipulation." [0012]. Thus, DOJ considers her a non-party for purposes of appeal. DOJ Brief p.3 n.2 (citing *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Apache Bend Apartments, Ltd. V. United States*, 987 F.2d 1174, 1177 (5th Cir. 1993) (*en banc*) (which cites *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J. concurring)); and *Ravetti v. United States*, 37 F.3d 1393, 1395 (9th Cir. 1994)). The Fifth Circuit went silent.

Three obvious problems with DOJ's objection.

The three most obvious problems with DOJ's objection to Tello's standing are these.

COMMUNITY PROPERTY.

First, Texas is a ("the") community property state. *See Rodgers*, 461 U.S. at 683 (state law determines whether property interest exists).

> In the cases before us, the Government argues that, under Texas law, the entire community property (*i. e.*, the underlying ownership interest that we have analogized to a remainder interest), rather than merely the delinquent spouse's half-interest in it, is liable for the indebtedness of the delinquent spouse. Reply Brief for United States 3; see Tex. Fam. Code Ann. § 5.61(c) (1975). The Court of Appeals did not address this issue, and we leave it open for determination on remand. *See Burks v. Lasker*, 441

U.S. 471, 486 (1979).

Id. at 699 n.27. Twenty years ago, DOJ wanted *all* of the community estate. Same 40 years ago. *Stapf.* But today, DOJ recognizes *none* of it?! *See also Craft* (state law governs rights to property).

> In contrast, a [Michigan] tenant in a tenancy by the entirety not only lacks a present divisible vested interest in the property and control with respect to the sale, encumbrance, and transfer of the property, but also does not possess the ability to devise any portion of the property because it is subject to the other's indestructible right of survivorship. [citation omitted]. This latter fact makes the property significantly different from community property, where each spouse has a present one-half vested interest in the whole, which may be devised by will or otherwise to a person other than the spouse. *See* 4 G. THOMPSON, REAL PROPERTY §37.14(a) (D. Thomas ed. 1994) (noting that a married person's power to devise one-half of the community property is "consistent with the fundamental characteristic of community property": "community ownership means that each spouse owns 50% of each community asset").

Id. at 296-97 (Thomas, J. dissent) (n.7 omitted).

See also Mitchell, 403 U.S. at 192 ("All income realized by both spouses ... was [Louisiana] community income.").

A fiduciary duty exists between husband and wife. *Loaiza*, 130 S.W.3d at 900-02. Spouses have authority to protect the community estate. *Toles*, 113 S.W.3d at 916-17. Assets and debts acquired during marriage are presumed community. *Loaiza*, 130 S.W.3d at 908 (inception of title); *Boyd*, 131 S.W.3d at 611-17; *Wall*, 630 S.W.2d at 496 (debts presumed community); *Cockerham*, 527 S.W.2d at 171-72 (factors to determine character of debt include spouse's implied assent).

If there were *ever* a reason for FED. R. APP. P. 3, it'd be recognition of the community property (asset/debt) issues.

DURESS RENDERS AN "AGREEMENT" VOIDABLE.

Secondly, an agreement made under duress is voidable. RESTATEMENT (SECOND) CONTRACTS § 177. *See also* 1 CORBIN ON CONTRACTS § 1.6; FED. R. CIV. P. 8(c).

TCR 91(f), the Tax Court's taser, creates an entire environment of duress, coercion and undue influence.

ILLEGALITY VITIATES AN "AGREEMENT."

Thirdly, getting to the essence of the point, an *illegal* agreement is instantly unenforceable.

> I write these additional words because I believe it important to specify that the statute need not, and does not, thereby make the worker's procedurally invalid promise totally void, *i. e.*, without any legal effect, say, like a contract the terms of which themselves are contrary to public policy. See 1 Restatement (Second) of Contracts, §7, Comment *a* (1979); 2 *id.*, §178.

Oubre, 522 U.S. at 431 (Breyer, J., concurring).

> § 178 When a Term is Unenforceable on Grounds of Public Policy
>
> (1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
>
> (2) In weighing the interest in the enforcement of a term, account is taken of
>
> (a) the parties' justified expectations,
>
> (b) any forfeiture that would result if enforcement were denied, and
>
> (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of
>
> **(a) the strength of that policy as manifested**

by legislation or judicial decisions,

(b) the likelihood that a refusal to enforce the term will further that policy,

(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and

(d) the directness of the connection between that misconduct and the term.

RESTATEMENT (SECOND) CONTRACTS § 178 (1981) (emphasis added).

There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen v. Hoffman*, 174 U.S. 639 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:

"The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it ...." *Id.*, at 654.

"[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest." *Id.*, at 669.

The rule was confirmed in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909),

> where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Id.*, at 262. [6]

Kaiser Steel Corp., 455 U.S. at 77-78 (with n.4).

It's ***illegal*** for an alleged fiduciary to distribute to a non-beneficiary. *See Pollock I*, 157 U.S. at 553-54 (*illegal* payments; *guilty* of breach of trust). Some penal codes call it "commercial bribery," TEX. PENAL CODE ANN. § 32.43; others, "embezzlement." *See*, e.g., 18 U.S.C.A. §§ 641-669. Problems due to unauthorized distributions are not *diminished* when coerced under color of law and office, which some people still call extortion! [7] In sum, UNITED STATES OF AMERICA ***is not*** going to *induce* an obligation "no one" understands, including the Secretary, Tax Court and DOJ, *coerce* a "deal" out of *one* community estate manager, *never prove* itself a rightful beneficiary, ***sanction*** Tello for demanding such proof, ***AND*** *assert* some benefit of the "deal," in abject defiance of the law, including Texas community property laws!

Thus, DOJ's objection to Tello's standing is the perfect segue, because it begs the TCR 91(f) question.

The depth of the problem with TCR 91(f).

The very threshold entrée into this state is *voluntary* agreement. *Ashwander*; FED. R. CIV. P. 9(a). The commercial identifier, i.e., the SSN, is *voluntarily* applied

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[6] [n.4]. See also *Hurd v. Hodge*, 334 U. S. 24, 34-35 (1948); *D. R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U. S. 165, 177 (1915); *Bement v. National Harrow Co.*, 186 U. S. 70, 88 (1902); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 548-549 (1902).

[7] *See UNITED STATES OF AMERICA v. Tharp*, No. 04-3772 (8th Cir.) (pending) (5:03-CV-5283 W.D. Ark. (Fay. Div.)).

for. *See* Form SS-5; <http://www.ssa.gov/online/ss-5.pdf>; 20 C.F.R. § 422.103(b)(1). Transactions in this state are based upon *voluntary* use of 31 U.S.C. § 5103 items. Asserting domicile in DC with a residence elsewhere is all purely *voluntary*. Even self-identification as a "taxpayer" is a purely *voluntary* commercial transaction.

Why has this always been the case, and why must it always be the case? Because no one is *compelled* to accept *benefits*. While acceptance of benefits is presumed, BOGERT § 169 (Notice to and Acceptance by Beneficiary), at 191 ("acceptance is presumed"), the alleged beneficiary may disclaim. *See* BOGERT §§ 170-72 (disclaimer and its effect); § 170, at 205 (Proof of Acceptance or Disclaimer). "Conduct by the beneficiary which is inconsistent with a trust for his benefit may amount to an implied disclaimer. ... [A] disclaimer amounts to a refusal to accept a gift of an equitable property right." BOGERT § 170, at 207. Since beneficiary status starts from the date of creation of the trust, disclaimer operates *nunc pro tunc* to that same date. BOGERT § 172, at 227-28.[8]

Tax Court discovery policy—the positive side.

Prohibiting discovery until the parties have at least tried, in good faith, to agree to some things, *see* TCR 51, 70(a)(1), 70(a)(2), 90, 91(a) and 100, is a policy that should be grafted into the Federal Rules of Civil Procedure. Many competent litigators opt that way, anyway, and some state courts, which have adopted the Federal Rules as the basis for the State Rules, generally, allow for mediation at a very early stage.

Compelling agreement is repugnant to public policy.

However, *compelled* agreement is the exact *antithesis* of the very soul of this state. It is one thing to establish a condition precedent for discovery of requiring an effort at stipulations. But it is *completely* another to compel

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[8] Put the shoe on the other foot, and disclaimer ***screams*** from (what's left of) this Record. *See* Question 7.

judicially a party to agree to admissions evidence, i.e., by way of *deemed stipulation!* A coerced will is not evidence. *See* 1 PAGE, THE LAW OF WILLS, §§ 5.7, 15.11 (rev. 2003). A coerced trust is not evidence. BOGERT §§ 42 at 434, 44 at 452 and n.16. A coerced commercial transaction is not evidence. U.C.C. § 1-103. In the ultimate setting, a coerced confession is not evidence. *Escobedo*; *Miranda*. The coercive environment vitiates the very "evidence" it purports to create.

> We also have emphasized that jurisdiction may not be grounded on a contract whose terms have been obtained through "fraud, undue influence, or overwhelming bargaining power" and whose application would render litigation "so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S., at 12, 18. Cf. *Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 329 (1964) (Black, J., dissenting) (jurisdictional rules may not be employed against small consumers so as to "crippl[e] their defense"). Just as the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively "judgment proof" for the consequences of obligations they voluntarily assume in other States, *McGee v. International Life Insurance Co.*, 355 U.S., at 223, so too does it prevent rules that would unfairly enable them to obtain default judgments against unwitting customers. Cf. *United States v. Rumely*, 345 U.S. 41, 44 (1953) (courts must not be " 'blind' " to what " '[a]ll others can see and understand' ").

Burger King Corp., 471 U.S. at 486.

How *does* compelled agreement with the attorney for the COMMISSIONER differ from in-person interviews with ambulance chasers, except, of course, (A) the *trial* context and (B) the IRS's unique form of influence under

color of law and office? *See Ohralik*. We can substitute "by mail" for "in person." *See Bates*. This changes the *litigation environment* coercion, substantively, how?

A stipulation, while agreed, is hardly neutral; it will work against one party or the other. Thus, a *stipulation* is (A) an "admission by party opponent," FED. R. EVID. 801(d)(2), for which each and every enumerated item in this Rule necessarily carries an implied character of *voluntary*, or of *self-initiated*, (B) a "statement against interest," FED. R. EVID. 804(b)(3), if the presumption of unavailability is satisfied, which statement is admissible *only* where the specifically stated term of *trustworthiness* is satisfied, or (C) a statement that otherwise qualifies as trustworthy so as to qualify as an exception to hearsay, per FED. R. EVID. 807.

Pick a context; involuntary action does not produce *trustworthy* evidence. Coercion vitiates *any* stipulation. Public policy forbids any other result.

Conclusion.

Trial is not about *agreement*. *Trial* is about *proof*. Where a "case" is "agreed to," at judicially imposed bayonet point, trial is a farce, a mockery, a sick joke.

Thus, it's difficult to find a rule more repugnant to public policy than TCR 91(f). This state depends upon *nothing* else the way it depends upon *voluntary* agreements. Tello objected to TCR 91, and KROUPA "unfiled" it via a "secret ruling." Tello also raised this issue by appealing the wife's case. DOJ's Brief, which blasts away at *Tello* for *not stipulating*, and which objects to Tello's standing to appeal for the wife despite FED. R. APP. P. 3, begs the TCR 91(f) issue. TCR 91(f) creates an entire environment of duress, coercion and undue influence. Thus, TCR 91(f) vitiates the very "evidence" it purports to create.

2. Can any of the Secretary, the Tax Court or the appellate court compel the accounting method?

Moot issue, here.

The Secretary failed to satisfy its threshold burden of proof, so we never reach the accounting method question. *See* Statement of Facts. No specific Point raised this.

Presume relevance.

Even if COMMISSIONER had satisfied its threshold burden, it still can't compel the accounting method. *Cf.* IRC §§ 446 (general rule for methods of accounting), 446(c) (permissible methods), 451(a) (year of inclusion as income), 481 (adjustments required by changes in method of accounting) and 985(b)(4) (functional currency change amounts to method change).

Income/expense timing and methods must match.

The general exceptions, if we think about it like that at all, are the requirements that (1) the income/expense *timing* matches, IRC § 461(a), *see also* IRC 164 (taxes) and 1281, 1282 (income and interest deduction allocable to accrued discount), and (2) the income and expense *methods* match. *Catto* (cash method for breeding stock mismatches overall accrual method for ranch).

GAAP method not automatically valid.

Of course, discretion exists to disallow a method. A GAAP method doesn't automatically qualify. *Thor*, 439 U.S. at 538-44 (regarding inventory methods).

Disallowing Tello's preferred method is ***unconscionable!***

But it's ***unconscionable*** for the Secretary *or* the Tax Court *or* an appellate court to say that the trust accounting method built into the 1041 fails to reflect "income" per *tax accounting* standards. *Cf. id.* at 531-38.

Conclusion.

To compel the use of one accounting method, where

multiple applicable methods work, is to compel agreement, which creates fatal problems as addressed in the preceding question. Still another connection between these two questions is this. The *Secretary* ***refused to stipulate*** to the accounting method, without punishment or sanction of any type, kind or nature. Quite to the contrary, the Tax Court *rewarded the Secretary* for such refusal, and ***sanctioned Tello*** for asserting his choice and defenses. Such is the way of kangaroo courts, picking and choosing who is compelled to agree to what.

Summary Judgment, Evidence

3. Are settlement discussions proper summary judgment evidence?

Rule 408 says no.

See Point 5.

Traditionally, FED. R. EVID. 408 renders settlement discussions inadmissible. As mentioned on appeal, both parties, given their perspectives, truly did bend over backwards to work with the other for as long as was possible. When BENFORD's cork popped, he included settlement discussions in response to Tello's summary judgment motion. BENFORD's purpose was to prove up the "f-word" for purposes of § 6673 penalties.

KROUPA "unfiled" Tello's objection.

In his Reply, Tello objected to such tender of "evidence," which Reply KROUPA secretly "unfiled." *See Ballard*. Since such "evidence" certainly doesn't qualify for § 6673 purposes, Tello doubts all the more that Rule 408 allows these settlement discussions for summary judgment purposes, either.

Summary Judgment, Ethics—Attorney as Witness

4. Did BENFORD violate ABA Rule 3.7?

In General—Necessary Witness can't be Advocate.

See Points 3 and 4.

ABA Rule 3.7 prohibits the dual role of attorney of Record and necessary witness. "A lawyer *shall not* act as advocate at a trial in which the lawyer is likely to be a necessary witness." *Id.* at 3.7(a) (emphasis added).

Thus, is BENFORD likely to be a necessary witness? Ordinarily, probably not. He's not the custodian of (the administrative) Records. Surely the collections agent has other expert fact witnesses, and other expert law witnesses, if such were needed. But BENFORD made himself a necessary witness via his Affidavit. [A-99].

No exception applies.

UNCONTESTED ISSUE.

Tello challenged (A) the meaning of "Balance 0.00" and of "[blank]," (B) the Secretary's failure to satisfy its threshold burden, and (C) the Secretary's inability to provide competent evidence of damages. BENFORD directly addressed the first two and indirectly addressed the third one. In sum, these are *contested* issues.

NATURE AND VALUE OF LEGAL SERVICES.

BENFORD addressed this ***nowhere***, amplifying the fact that his testimony is not limited to such topic.

SUBSTANTIAL HARDSHIP ON CLIENT.

Since the Chief Counsel's Office is still the largest law firm this nation has ever known, it's impossible to conclude that BENFORD's disqualification would work any hardship, whatsoever, on COMMISSIONER.

Regarding Comment 2.

BENFORD has no personal knowledge of the administrative file. His observations on what "Balance 0,00" means, and on what "[blank]" means, are *analytical*,

not *factual*, and this entire process is *more than* misled by both his factual and legal analyses, generally.

Trier of fact, and prejudice.

On one hand, Tello overtly noted that the trier of fact is not likely to be confused by BENFORD's dual roles, and that Tello is not prejudiced by BENFORD's remaining as attorney of Record. On the other, Tello also overly noted that these are not part of the ABA Rule 3.7 analysis, and that the Rule is a *shall not* rule. [A-107 to -109].

Conclusion.

Since none of the exceptions applies, the general *shall not* rule applies, and BENFORD violated ABA Rule 3.7 by remaining attorney of Record in this case.

Due Process, Ethics, Evidence, *Ballard* "Secret Rulings"

5. Did KROUPA issue "secret rulings?"

KROUPA's first "secret ruling" in this case.

See Points 1, 2, 21, 22 and 30.

See R.E. 17 [A-14]. On or about 14 June 2004, KROUPA "unfiled' Tello's Objections to TCRs 91, 121, 50 and 21, but neither the Docket Sheet nor the Record reflects any such transaction, whatsoever. It's as if these objections simply never existed. Tello had to supplement the Record on appeal to introduce the "order" to the Record and to reintroduce these objections.

KROUPA ordered these "unfiled" because there were no *motions* to which these "objections" were responsive. In just about every other court in this state, the document responsive to a motion is a "response," not an "objection."

KROUPA's second "secret ruling" in this case.

See R.E. 18. [A-16]. On or about 15 June 2004, KROUPA "unfiled" Tello's Reply. But for supplementing the Record, there'd be nothing to indicate that the Reply

ever existed. No order documented the transaction.

KROUPA ordered this "unfiled" because she had already ruled on (denied) the motion.

Local Rules don't overrule Due Process.

See Ballard. They don't overrule Equal Protection, either. *Frazier* (Louisiana attorney can't be denied access to Louisiana federal court). They don't overrule fundamental rights. *Chandler* (Florida's experimental policy with "court TV" didn't offend fundamental rights). And, they don't overrule acts of congress. *Wingo*, 418 U.S. at 472-73 (statute renders Ky. Local Rule 16 invalid as "inconsistent with the laws of the United States").

Conclusion.

"Secret rulings" are so instantly hideous to Due Process as to justify judicial and ethical sanctions, on top of everything else that such actions trigger. KROUPA simply up and ripped these documents, wholesale, from the Record, as if they never existed. This judicial behavior is ***unconscionable!*** "The government" cannot benefit where its collection system "judges" manage their cases this way.

6. Should KROUPA have self-recused? If so, is the *Liljeberg* standard satisfied?

KROUPA should have self-recused.

See Points 1, 2, 7-9, 13-16 and 18-32.

No one is lawfully compelled to trial in a kangaroo court. 28 U.S.C. § 455(a). KROUPA proclaimed her proclivity toward lawlessness in these ways:

- vacating the order that requires responses to Tello's summary judgment motion;
- denying Tello summary judgment;
- denying continuance to consider summary judgment;
- failing to compel the alleged beneficiary to satisfy its threshold burden;

- "unfiling," without lawful cause, Tello's Objections to TCRs 91, 121, 50 and 21;
- "unfiling," by "secret ruling," Tello's Objections to the TCRs; *thereby*
- approving TCR 91(f) and the other TCR problems;
- "unfiling," without lawful cause, Tello's Reply;
- "unfiling," by "secret ruling," Tello's Reply;
- "unfiling," without lawful case, Tello's Trial Announcement (to the effect that neither the Secretary nor the Tax Court were ready for trial);
- threatening Tello with sanctions via phone conference for his arguing his defenses;
- threatening Tello with sanctions in writing for his arguing his defenses;
- dismissing his case;
- advising the Secretary to seek sanctions;
- allowing the Secretary to present a "case" without ever satisfying its threshold burden;
- allowing BENFORD to testify, which "evidence" was unsworn;
- sanctioning Tello for asserting his defenses;
- enjoining Tello from asserting his defenses; and
- entering judgment against Tello et ux.

A reasonably objective person can conclude that a "judge" who ***sanctions*** litigants who assert the very *same* law to which that "judge" swore an oath, and who butchers the Record, by way of "secret rulings," is sufficiently partial to be disqualified from that case.

Liljeberg is satisfied.

Where recusal should have happened, but didn't, the decision to vacate analyzes these three factors:

- "the risk of injustice to the parties in the particular case[;]"
- "the risk that the denial of relief will produce injustice in other cases[;] and"
- "the risk of undermining the public's confidence in

the judicial process."
Liljeberg, 486 U.S. at 864.

RISK OF INJUSTICE TO TELLO.

Risk-assessment has long since passed into actuality! There's a high risk of injustice to ***any*** party where the "judge" bends over backwards to defy the law in order to rule against that party. To ***sanction*** a party for arguing the law crashes head-on into the ethical considerations, and entering "secret rulings" invites still another body of law into the matter. Where the "judge" characterizes the law, itself, as "*f-word and g-word*," risk of injustice to Tello screams from the page.

RISK OF INJUSTICE IN OTHER CASES.

"Secret rulings" pose such a risk that *Ballard* exists. Also, at least one more Tax Court "secret ruling" case is pending in the Ninth Circuit. [9] Further, where a "judge" sanctions a party for arguing the law, it's impossible for that not to affect other cases. In addition to Tello's second Tax Court case, [10] there are at least two more sets of Record butchering, "sanction them who argue the law" cases, of far greater severity, expected to be pending in the Fifth Circuit. [11]

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[9] *O'Connor v. Commissioner*, No. 05-70536 (9th Cir.) (pending). GERBER struck, without notice or order, O'Connor's motion to strike.
[10] *Tello v. Commissioner*, No. 04-61146 (5th Cir.) (pending).
[11] *Florance v. Commissioner*, USTC Nos. 11782-03, 18209-03L (VASQUEZ, J., "unfiled" Florance's discovery, and then ordered Florance to refile it! VASQUEZ ordered Florance to respond to combined motion*S* that would be "unfiled" if filed by Florance. No order "unfiling" the *Secretary's* motion*S* exists. One motion was for summary judgment, in which ***the Secretary (FLICK) literally declared war, and VASQUEZ ordered a response!*** When the Secretary (FLICK), out of the blue, filed *new*, and separated, motions, VASQUEZ granted them ex parte, having never ordered Florance to respond!);

Stearman v. Commissioner, No. 05-60521 (5th Cir.) (two cases) (Except for the declaration of war, matters are similar to Florance's, Additionally, VASQUEZ ordered joinder, which caused Stearman's discovery period for the second case to end 15 days before it started!).

RISK OF UNDERMINING PUBLIC CONFIDENCE IN JUDICIAL PROCESS.

Tello expects that few things are more horrific to the American people than a "judge" who is so biased (and/or uninformed) that she overtly slanders the law, sanctions those who argue the law, butchers the Record and issues "secret rulings."

Conclusion.

Since KROUPA should have self-recused, and didn't, and since the *Liljeberg* standard is more than satisfied, it follows that the "final judgment" is properly vacated.

7. Does IRC § 7459(d) have one sentence or two?

Failure to prosecute?

See Points 25, 26 and 27.

Throughout the entire matter KROUPA presumed evidence that BENFORD never proved and the Record never contained. Tello demanded that the alleged beneficiary satisfy its threshold burden of proof, for which effort he and the law have been libeled, slandered, "f-word'ed" and sanctioned. Yet, none of that has changed the law *or* satisfied Tello's demand. Instead, it proves disclaimer, which admissions evidence is all over (what's left of) this Record. How, then, does ***any*** alleged fiduciary "fail to prosecute" such a matter?

Judgments require evidence.

This case exemplifies why the architects of this system require the Tax Court, per IRC § 7459(d), to justify, *from the Record*, their "orders," as all courts are so compelled. That requirement is found in the *second* sentence of § 7459(d). Even if lawlessness, "secret rulings," and threat of sanctions for arguing the law *were not* justification for refusing to move forward in a kangaroo

---

Between these four cases, VASQUEZ secretly "unfiled" at least 27 different documents; penalties ordered approach $30,000.

court, this *second* sentence of § 7459(d) still requires that decisions be based upon the Record. Dismissal or no dismissal, no judgment stands without evidence.

The evidence here proves disclaimer: wholesale failure and refusal to satisfy the threshold burden; ***sanctions*** for demanding such; *sworn* "Balance 0.00;" and no competent evidence of damages; hence a wholesale failure even to establish standing, much less a claim, much less damages.

Conclusion.

In sum, KROUPA's fact-finding is clearly erroneous. Section 7459(d) has *two* sentences; no judgment stands without evidence. There is not one shred of evidence in (what's left of) this Record that justifies this "judgment."

8. Is TELLO entitled to § 6673 penalties?

Overview.

What's good for the goose is good for the gander.

WHO—ALL BAD ACTORS.

Train car loads of "penalties" exist to "correct" the "wayward" "taxpayer." Virtually nothing exists to correct systemic abuse by the Secretary, *see* IRC § 7430, and even less exists to correct systemic abuse by UNITED STATES TAX COURT. The "remedies" that *do* exist are connected with "attorneys fees," *see, e.g.*, § 6673(a)(2)(B), leaving the entire class of *pro se* litigants without an effective remedy, and that in a dispute-resolution system *designed entirely around the pro se litigant.*

It is impossible to conceive that congressional policy would be (A) to *create* a biased forum, in whole, much less in part by deliberately singling out an entire class of litigants, the *pro se*'s, for special, Due-Process-defying, treatment, much less (B) to deny sanctions. Therefore, it follows that the congressional policy is to penalize the *conduct* proscribed, *including* that conduct where the Secretary or UNITED STATES TAX COURT is the principal. *Cf.* § 6673(a)(2) ("any attorney or other person

admitted to practice law before the Tax Court").

WHAT—ALL VEXATIOUS MULTIPLICATION OF PROCEEDINGS.

The conduct at issue is vexatious multiplication of the proceedings. *Cf.* 28 U.S.C. § 1927. Tello finds that lawless (defiance of the law under color can be viewed no other way) judicial activity vexatiously multiples the proceedings, thereby bringing such activity within § 6673. Tello further reads § 6673 as limiting only a *"taxpayer's"* upper limit to $25,000, not the Secretary's, not DOJ's, and not the UNITED STATES TAX COURT's, regarding which upper limit § 6673 is silent. For them, the penalty is competently limited by "punishment that fits the conduct."

Application.

Where even the represented litigant is thumped for "f-word" presentations, can the courts escape an equal thumping for being lawless? Where economic/financial measures are found suitable to bring the *accused* into awareness of the law, are such not just as suitable to bring the *prosecutor* and the *court* into similar awareness? Where the ABA-approved curriculums, and licensing exam programs, and the CLE programs *and* the lower courts compel the *pro se* to supplement this Court's continuing legal education program, those judiciary and attorney CLE hours are not "free of charge," for they are not sponsored by any bar association.

KROUPA vexatiously and unreasonably multiplied these proceedings. We're not just talking error and abuse of discretion. We're talking "bad faith," with scienter. Her lawlessness is already itemized. *See* Question 6. KROUPA's conduct *more than* exceeds the scope of the employment contract. In addition to a "tax" bill of $0, Tello is entitled to § 6673 penalties from KROUPA in the amount of the total amount "ordered" due, plus interest, *plus* a minimum of $10,000 per level of litigation (this is

the third level) whether individually, or jointly and severally with each "bad actor," including her employer and BENFORD (and SHEEHAN and DOJ).

Conclusion.

Ballard is relatively new, but the doctrine it supports is ancient. Since the present "secret ruling" momentum is gargantuan, *Ballard* plus § 6673 will be more likely to cure the "secret ruling" addiction that permeates the Tax Court, and with far fewer treatments, and with far greater expectations of full recovery without relapse.

Conclusion

The United States court of appeals has upheld (more like duplicated, actually), the Tax Court's "judgment," which effectively (A) defies the substantive law of this state, (B) butchers Due Process, and (C) makes a mockery, generally, of the entire trial process. The Tax Court's manifest deviation from the law, inexorably intertwined with the flagrant violation of oath to uphold the law of this state, is only amplified by the uninformed, ad-hominem-laced attitude, perspective and demeanor brandished also by the Secretary and DOJ. The appellate court's "pass-thru" of the Tax Court's departure into fantasy, overtly and desperately "supported" by phantom citations and authority, conflicts with (1) the ancient Common Law and additional foundational law of this state, (2) longstanding federal statutory provisions, (3) relevant decisions of this Court, (4) relevant decisions of other courts of appeals and even (5) its own precedent.

Whether TCR 91(f) violates public policy is an important question of federal law that has not been, but should be, decided by this Court.

By going silent regarding TCR 91, in particular the stun-gun provisions of TCR 91(f), thereby tacitly approving the Tax Court's creation of an entire environment of compelled agreement, as well as tacitly

approving the Tax Court's addiction to "secret rulings," thus KROUPA's mindless "unfiling" of Tello's Objection to TCR 91, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned (i.e., encouraged) the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By going silent regarding accounting methods, thereby tacitly approving the Tax Court's creation of an entire environment of compelled agreement, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By going silent on settlement discussions tendered as summary judgment evidence, and by going silent on whether the attorney of Record may make himself a necessary witness *and* remain as attorney of Record, in violation ABA Rule 3.7, thereby tacitly approving the Tax Court's running roughshod over the summary judgment process, the trial process and the applicable ethical considerations, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By going silent on KROUPA's "secret rulings," thereby tacitly approving KROUPA's butchery of the Record, thus also of Due Process, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of

appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By going silent on self-recusal and *Liljeberg*, thereby tacitly approving KROUPA's kangaroo court, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

By going silent on the alleged "failure to prosecute," and the related dismissal based upon that allegation, and by going silent on the related fact-finding by KROUPA, which is clearly erroneous, thereby tacitly approving a judgment that has absolutely no supporting evidence in (what's left of) the Record, at all, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

And, not only by going silent on the Tax Court's award of sanctions to a non-party, but also by proclaiming Tello's appeal as frivolous and groundless and issuing *more* sanctions, thereby by joining the Secretary, the Tax Court and DOJ in overt libel and slander of the law of this state, the court of appeals has (1) entered an opinion that conflicts with relevant decisions of this Court and with relevant decisions of other courts of appeals, and (2) so far departed from the accepted and usual course of judicial proceedings, and has sanctioned the same departure by the lower court, as to call for the exercise of this Court's supervisory power.

Remedies Requested

1. Petitioner requests that this Court grant the petition, issue the writ of certiorari and take jurisdiction of this matter.
2. Petitioner requests that the judgment on appeal be vacated, and, ultimately, that the trial court judgment be vacated.
3. Petitioner requests a declaratory judgment that TCR 91(f) violates public policy.
4. Petitioner requests summary judgment in his favor.
5. Petitioner requests IRC § 6673 penalties in his favor.
6. Should the Court identify additional issues for briefing, Petitioner requests the opportunity to submit such brief.
7. Petitioner requests the non-argument calendar. Oral argument is not expected to aid the resolution of these issues.
8. Petitioner requests that costs be taxed to Respondent.
9. Petitioner requests any and all other relief at law, in equity or sui generis to which he may show himself justly entitled.

Respectfully submitted,

John Tello, *pro se*
P.O. Box 870983
Mesquite, Texas 75187

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Rule 14.1(i)(i)—Appellate Opinion

2005 Apr 18

United States Court of Appeals
Fifth Circuit
F I L E D
April 18, 2005
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-60955
(Summary Calendar)

JOHN TELLO; ET AL,

Petitioners,

JOHN TELLO

Petitioner - Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent – Appellee.

Appeal from a Decision of the
United States Tax Court
No. 19480-02

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:[1]

[⊥2] John Tello, *pro se*, appeals the decision of the United States Tax Court. The Tax Court dismissed

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Tello's petition for failure to prosecute and sanctioned him under Internal Revenue Code § 6673 in the amount of $2,500 for advancing frivolous positions and instituting and maintaining the proceeding primarily for delay. We review both dismissals for failure to prosecute and the imposition of sanctions under I.R.C. § 6673 for abuse of discretion. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992); *Sandvall v. Commissioner*, 898 F.2d 455, 459 (5th Cir. 1990).

"We will affirm dismissals with prejudice for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile." *Berry*, 975 F.2d at 1191. We generally will affirm a dismissal only if we find at least one of three aggravating factors: (1) delay caused by the plaintiff himself (2) actual prejudice to the defendant; or (3) delay as a result of the intentional conduct. *Id.*

The record shows that Tello failed to appear at the calender [2] call and recall of his case; failed to cooperate with the Commissioner in preparing a stipulation of facts (including refusing to stipulate to his birth date); refused to address the merits of his case; ignored warnings to stop making frivolous arguments; and simply wasted the time and resources of the Tax Court and of the Commissioner. Tello ignored numerous threats of sanctions, including of dismissal, by the Tax Court. Tello also makes several arguments on appeal similar to those that he raised below. We agree with the Tax Court that "without exception, the arguments that [Tello] makes are arguments that this Court and other courts have found to be frivolous" and that he was "instituting or maintaining

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[2] As such in original.

this proceeding primarily, if not exclusively, as a protest against the Federal income tax system and his proceedings [⊥3] in this Court is merely a continuation of [Tello's] refusal to acknowledge and satisfy his tax obligations." Tello' s *pro se* status does not excuse his actions. *See Parker v. Commissioner*, 117 F.3d 785, 787 (5th Cir. 1997). Furthermore, the Tax Court did not abuse its discretions in sanctioning Tello in the amount of $2,500 under I.R.C. § 6673(a), which allows sanctions whenever a taxpayer institutes or maintains a proceeding primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless. We therefore AFFIRM the judgment of the Tax Court.

The Commissioner also moves to sanction Tello $6,000 for maintaining a frivolous appeal so that the government can be compensated for the costs of defending the appeal. A party who continues to advance long-defunct arguments invites sanctions. *Longsdale v. Commissioner*, 661 F.2d 71, 72 (5th Cir. 1981). We GRANT the Commissioner's motion for sanctions of $6,000 for pursuing a frivolous appeal, pursuant to 26 U.S.C. § 7482(c)(4) and Fed. R. App. P.38. *See Parker*, 117 F.3d at 787 (approving the practice of imposing a lump sum sanction in lieu of costs because it "saves the government the additional cost of calculating its expenses, and also saves the court the time and expense of reviewing the submission of costs").

Rule 14.1(i)(ii)—Additional Orders

Trial Court

2004 Jul 8 Final Judgment

UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN TELLO AND TAMARA A. TELLO, Petitioners	)	
v.	)	Docket No. 19480-02.
COMMISSIONER OF INTERNAL REVENUE, Respondent	)	

ORDER AND
ORDER OF DISMISSAL AND DECISION

This case was recalled from the calendar for the Trial Session of the Court at Dallas, Texas on June 21, 2004. There was no appearance by or on behalf of petitioners. Petitioner Tamara A. Tello was advised that she did not need to make an appearance because she had already signed a Stipulation of Settled Issues, which was filed with the Court on November 25, 2003. Counsel for respondent appeared and filed with the Court a motion for entry of decision as to petitioner Tamara A. Tello, a motion to dismiss petitioner John Tello for lack of prosecution, and a motion for sanctions under I.R.C. section 6673 as to petitioner John Tello. The Court finds that respondent has met his burden of production with respect to the addition to tax under I.R.C. section 6651(a)(1) relating to petitioner John Tello. After due consideration and for cause more fully appearing in the transcript of the proceedings, it is

ORDERED that respondent's motion for entry of decision as to petitioner Tamara A. Tello, filed June 21, 2004, is granted. It is further

ORDERED that respondent's motion, filed June 21, 2004, is granted and this case is dismissed for lack of prosecution as to petitioner John Tello. It is further [⊥2]

JOHN TELLO AND TAMARA A. TELLO
Docket Number 19480-02

ORDERED and DECIDED that the there are due from petitioner Tamara A. Tello deficiencies and additions to tax as follows:

		Additions to Tax Under Internal Revenue Code Sections:	
Year	Deficiency	6651(a)(1)	6654
1996	$ 8,279.[3]	$ 100.	None
1997	$ 9,691.	$ 749.25	$ 120.56
1998	$ 7,488.	$1,510.	$ 269.01
1999	$10,425.	$2,601.75	$ 503.57
2000	$34,275.	$8,568.75	$1,830.78

It is further

ORDERED and DECIDED that there are due from petitioner John Tello deficiencies and additions to tax as follows:

		Additions to Tax Under Internal Revenue Code Sections:	
Year	Deficiency	6651(a)(1)	6654
1996	None	None	None
1997	None	None	None
1998	$ 500.	$ 100.	N/A
2000	$4,191.	$1,044.	None

[3] Where the original has ".00," the ".00" is left off.

It is further

ORDERED that respondent's motion for sanctions under IRC section 6673 as to petitioner John Tello, filed June 21, 2004, is granted and a penalty under I.R.C. section 6673 in the amount of $2,500.00 is awarded to the United States from petitioner John Tello.

/s/ Diane Kroupa
Diane L. Kroupa
Judge

ENTERED: JUL - 8 2004

2004 Jan 14 Standing Pretrial Order

015 [4]

UNITED STATES TAX COURT
WASHINGTON, D.C.
www.ustaxcourt.gov

STANDING PRETRIAL ORDER

To the parties named in the Notice Setting Case For Trial to which this Order is attached:

The parties shall begin discussions as soon as practicable for purposes of settlement and/or preparation of a stipulation of facts. Valuation cases and reasonable compensation cases are generally susceptible of settlement, and the Court expects the parties to negotiate in good faith with this objective in mind. All minor issues should be settled so that the Court can focus on the issue(s) needing a Court decision.

If difficulties are encountered in communicating with another party, or in complying with this Order, the affected party should promptly advise the Court in

[4] The three-digit number is the Docket Entry No. This is the second of two Standing Pretrial Orders; the first is 008.

writing, with copy to each other party, or in a conference call among the parties and the trial judge.

Continuances will be granted only in exceptional circumstances. See Rule 1.33, Tax Court Rules of Practice and Procedure. (The Court's Rules are available at **www.ustaxcourt.gov**.) Even joint motions for continuance will not routinely be granted.

The Court may impose-appropriate sanctions, including dismissal, for any unexcused failure to comply with this Order. See Rule 131(b). Such failure may also be considered in relation to sanctions against and disciplinary proceedings involving counsel. See Rule 202(a).

To facilitate an orderly and efficient disposition of all cases on the trial calendar, it is hereby

ORDERED that all facts shall be stipulated to the maximum extent possible. All documentary and written evidence shall be marked and stipulated in accordance with Rule 91(b), unless the evidence is to be used solely to impeach the credibility of a witness. Objections may be preserved in the stipulation. If a complete stipulation of facts is not ready for submission at the commencement of the trial or at such other time ordered by the Court, and if the Court determines that this is the result of either party's failure to fully cooperate in the preparation thereof, the Court may order sanctions against the uncooperative party. Any documents or materials which a party expects to utilize in the event of trial (except solely for impeachment), but which are not stipulated, shall be identified in writing and [12] exchanged by the parties at least 14 days before the first day of the trial session. The Court may refuse to receive in evidence any document or material not so stipulated or exchanged, unless otherwise agreed by the parties or allowed by the Court for good cause shown. It is further

ORDERED that unless a basis of settlement has been reached, each party shall prepare a Pretrial Memorandum substantially in the form attached hereto, which shall indicate the current status of the case. Each party shall submit the Pretrial Memorandum directly to the undersigned and to the opposing party not less than 14 days before the first day of the trial session. It is further

ORDERED that witnesses shall be identified in the Pretrial Memorandum with a brief summary of the anticipated testimony of such witnesses. Witnesses who are not identified will not be permitted to testify at the trial without leave of the Court upon sufficient showing of cause. Unless otherwise permitted by the Court upon timely request, expert witnesses shall prepare a written report which shall be submitted directly to the undersigned and served upon each other party at least 30 days before the first day of the trial session. An expert witness's testimony may be excluded for failure to comply with this Order and the provisions of Rule 143(f). It is further

ORDERED that, where a basis of settlement has been reached, a stipulated decision shall be submitted to the Court prior to, or at the call of the calendar on, the first day of the trial session. Additional time for submitting a stipulated decision will be granted only where it is clear that settlement has been approved by all parties, and the parties shall be prepared to state for the record the basis of settlement and the reasons for delay. The Court will specify the date by which the stipulated decision and any related settlement documents will be due. It is further

ORDERED that all parties shall be prepared for trial at any time during the term of the trial session unless a specific date has been previously set by the Court. It is further

ORDERED that every pleading, motion, letter or

other document (with the exception of posttrial briefs, see Rule 151(c)) submitted to the Court by any party subsequent to the date of the Notice Setting Case For Trial shall be served by the party upon every other party or counsel for a party and shall contain a certificate of service as specified in Rule 21(b).

/s/ Joel Gerber [5]
Joel Gerber
Judge

Dated: **January 14, 2004** [6]

2004 Mar 31 Order denying severance

021
UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN TELLO AND TAMARA A. TELLO, Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On February 23, 2004, petitioner John Tello filed a motion entitled John Tello's Motion For Severance to sever petitioner Tamara A. Tello from that of petitioner John Tello on the ground that severance will simplify the processing of this case for both petitioners.

On March 24, 2004, respondent filed Notice Of No Objection To Petitioner John Tello's Motion For Severance. Counsel for respondent does not oppose the granting of this motion.

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[5] Docket Entry 008 is signed by Juan F. Vasquez.
[6] Docket Entry 008 is dated June 27, 2003.

On March 30, 2004, petitioner Tamara A. Tello filed a response in compliance with the Court's order of March 18, 2004.

Upon due consideration, it is

ORDERED that petitioner's John Tello's Motion For Severance is denied.

/s/ Diane Kroupa
Diane L. Kroupa
Judge

Dated: Washington, D.C.
March 31, 2004

SERVED MAR 3 1 2004

2004 May 24 Order to respond to Tello's Summary Judgment Motion

023
UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN TELLO AND TAMARA A. TELLO, Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

Upon due consideration of petitioner John Tello's Motion for Summary Judgment filed April 29, 2004, it is

ORDERED that on or before June 10, 2004, petitioner Tamara A. Tello and respondent shall respond or object to petitioner John Tello's Motion for Summary Judgment.

/s/ Diane L. Kroupa /@
Diane L. Kroupa
Judge

Dated: Washington, D.C.
May 24, 2004

2004 May 28 **Order denying continuance, reneging (vacating) 2004 May 24 Order, denying Summary Judgment and denying "Motion" to Shift Burden of Proof**

027
UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN TELLO AND TAMARA A. TELLO, Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

This case is calendared for trial on the June 21, 2004, Dallas, Texas trial session.

On April 29, 2004, the Court received John Tello's Motion for Summary Judgment and the Court requested a reply from respondent and petitioner Tamara A. Tello to be filed by June 10, 2004.

On May 24, 2004, the Court received John Tello's Motion for Continuance. On May 26, 2004 the Court received Petitioner's Motion to Shift Burden of Proof.

The Court has considered the various and numerous documents that petitioner John Tello has submitted to the Court in this matter. Without exception, the arguments that petitioner John Tello makes are arguments that this Court and other courts have found to be frivolous. For example, petitioner John Tello challenges the authority of the Internal Revenue Service (IRS) over him and he challenges his obligation to pay income tax. We are convinced that no purpose would be served in repeating all that has been said about his frivolous and misguided arguments. We are also convinced from the numerous documents that petitioner John Tello has submitted to the Court in this matter that it appears petitioner John Tello is instituting or maintaining this proceeding primarily, if not exclusively, as a protest against the Federal income tax system and his proceeding in this Court is merely a continuation of petitioner John Tello's refusal to acknowledge and satisfy his tax obligations.

SERVED JUN 1 2004 [12]

We take this opportunity to admonish petitioner John Tello that, if he continues to make these type of arguments, he is at risk of the Court imposing a penalty against him under section 6673(a)(1). Section 6673 authorizes the Tax Court to require a taxpayer to pay to the United States a penalty up to $25,000 whenever it appears that proceedings have been instituted or maintained by the taxpayer primarily for delay or that the taxpayer's position in such proceedings is frivolous or groundless.

Upon due consideration and for cause, it is

ORDERED that petitioner John Tello's Motion for Continuance received May 24, 2004, is denied. It is further

ORDERED that the Court's Order dated May 24, 2004, is vacated such that neither respondent nor

petitioner Tamara A. Tello need file a response to petitioner John Tello's Motion for Summary Judgment. It is further

ORDERED that petitioner John Tello's Motion for Summary Judgment filed April 29, 2004, is denied. It is further

ORDERED that Petitioner's Motion to Shift Burden of Proof is denied.

/s/ Diane L. Kroupa /@
Diane L. Kroupa
Judge

Dated: Washington, D.C.
May 28, 2004

2004 Jun 14 **R.E. 17. "Secret Ruling" "unfiling" Tello's Objections to TCRs 91, 121, 50 & 21**

UNITED STATES TAX COURT [7]
WASHINGTON, D.C. 20217

DKT. NO(s). 19480-02 [8]

The enclosed documents: Petitioner's Objection to Rule 91; Petitioner's Objection to Rule 121; Petitioner's Objection to Rule 50; Petitioner's Objection to Rule 21

received 06 / 01 / 04 are returned *unfilled* [9] for the following reason(s):

FORM AND STYLE

☐ Caption incomplete or incorrect. Rule 23(a)(1). Correct caption is:

☐ Docket number incomplete or incorrect.

☐ Insufficient copies. Rule 23(b).

☐ No signature or no original signature. Rule 23(a)(3).

☐ Improper joinder of motions. Rule 54.

STATUS OF REPRESENTATIVE

☐ Representative not admitted to practice. Rule 200.

☐ No entry of appearance filed by representative. Rule 24(a).

☐ Motion to withdraw representative. Failure to comply with Rule 24(c).

☐ Include current address(es) and telephone

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[7] The entire pre-printed form, which shows the extent of the Tax Court's "unfiling" pre-meditation, is included for R.E. 17.

[8] Overhanging underscore intends to show where the Tax Court's pre-printed "unfiling" form comes with "fill-in" blank lines.

[9] Emphasis in original.

number(s) of petitioner(s).

☐ Power of attorney not recognized.

CONSOLIDATION

☐ All cases not at issue. Rule 141(a).

☐ All docket numbers must appear in caption of document in chronological order beginning with earliest number.

☐ Place of trial must be same for all cases.

MISCELLANEOUS

☐ Discovery requests/responses are not filed. Rules 71(c) and/or 72(b). [10]

☐ Not timely-motion for leave to file or equivalent needed.

☐ Documents appear to be in the nature of evidence and cannot be kept by the Court at this time.

☐ Not a proper document to be filed with the Court.

☐ Motion to change place of trial required. Rule 140(c).

☐ Tax returns are not filed with the Tax Court

☐ Decision/Order of Dismissal entered

☒ Per Judge's direction. No motions are pending to which the objections can be directed to. Also no Certificate of Service on Tamara Tello as required by Standing Pretrial Order.

LG

NOTE: All Rule references are to a current copy of the Tax Court Rules of Practice and Procedure. A copy of the Rules may be obtained for $22.00 by writing to the Administrative Office, United States Tax Court, 400

[10] *But see* Docket Entry Nos. 0013, 0016, *infra*, A-44 and -45.

Second Street, N.W., Washington, D.C. 20217, or to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, and enclosing a check for the appropriate amount. The Rules are also available on the Tax Courts Internet web site, **www.ustaxcourt.gov**.

Office of the Clerk
Date 06 / 14 / 04

2004 Jun 15 R.E. 18. "Secret Ruling" "unfiling" Tello's Reply

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

DKT. NO(s). 19480-02

The enclosed documents: John Tello's Reply Regarding His Motion for Summary Judgment

received 06 / 09 / 04 are returned *unfilled* [11] for the following reason(s): ...

MISCELLANEOUS ...

☒ Per Judge: Action has been taken on motion for summary judgment

LG

...

Office of the Clerk
Date 06 / 15 / 04

[11] Emphasis in original.

2004 Jun 21 Transcript Vol. 1 of 21 June 2004

[Tr. p.4 [A-21]—Discussion regarding motion to dismiss and advice regarding sanctions]
[Tr. pp.2-3 [A-19 to -20]—Discussion regarding sanctions]

036
U.S. TAX COURT

DOCKET NUMBER: 19480-02

In the Matter of:

JOHN TELLO & TAMARA A. TELLO,
Petitioners,
vs.
COMMISSIONER OF THE INTERNAL REVENUE,
Respondent.

Pages: 1-5

Location: Dallas, Texas

Date: June 21, 2004

RECEIVED
ADMINISTRATIVE OFFICE
'04 JUL 20 P 3 :32
UNITED STATES
TAX COURT

On the Record Reporting, Inc.
3307 Northland Drive, Suite 315
Austin, Texas 78731
(512) 450-0342

ORIGINAL [⊥ 1]

UNITED STATES TAX COURT

In the Matter of:	)	
JOHN TELLO & TAMARA A. TELLO, Petitioner, [12]	)	
vs.	)	Docket No. 19480-02
COMMISSIONER OF THE INTERNAL REVENUE, Respondent.	)	

Room 591
Federal Building
207 S. Houston Street
Dallas, Texas

Monday,
June 21, 2004

The above-entitled matter came on for calendar call, pursuant to notice, at 10:00 a.m.

BEFORE: HON. DIANE L. KROUPA
Judge

APPEARANCES:

On behalf of the Petitioner:
NONE

On behalf of the Respondent:
GARY BENFORD, ESQ.
Internal Revenue Service
4050 Alpha Road, 13th Floor
Dallas, Texas 75244

ON THE RECORD REPORTING
(512) 450-0342 [⊥ 2]

---

[12] As such in original.

PROCEEDINGS

THE CLERK: Docket Number 19480-02, John Tello and Tamara A. Tello.

MR. BENFORD: Gary Benford for Respondent, Your Honor.

THE COURT: Good morning. Where is Mr. Tello?

MR. BENFORD: I haven't spoken to him since shortly after our conversation last week with the Court. He did inform me at that time that he fully expected to be here this morning.

THE COURT: All right. Well, let's just make sure. Mr. Tello? Is there anyone in the courtroom by the name of Mr. Tello?

(No response.)

THE COURT: For the record, the Court had a conference call with Mr. Benford and Mr. Tello on I believe it was Thursday of last week. Mr. Tello is an individual who does not believe he is a taxpayer. He has Not filed any tax returns until recently, in which he filed a form 1041, which is a fiduciary return.

We had a conference call last Thursday, because I wanted to warn Mr. Tello again verbally. I had already warned him in a written order of the Court that if he continued to make the arguments that he was making, that I was going to impose sanctions against him under Section

6673, and I explained that I was able to impose sanctions of up to $25,000 if he continued to make frivolous arguments which this Court and hundreds of other courts have found to be frivolous.

Mr. Tello also filed a writ of prohibition with the Fifth Circuit Court of Appeals, requesting that the Fifth Circuit order me to prevent taking the action with respect to his claim.

So, Mr. Benford, where do we go now?

MR. BENFORD: Your Honor, I have – Respondent has prepared a motion to dismiss as to Petitioner John Tello for lack of prosecution. I would note therein that we're making concessions based on information that we obtained by discovery, and the deficiency and additions to Tax are substantially less than were in the Notice of Deficiency.

THE COURT: All right. So it is substantially less. What is Respondent's position regarding the imposition of sanctions?

MR. BENFORD: Probably should address that next, Your Honor. I was waiting to see if you were going to rule on that.

THE COURT: Okay. Well, I think maybe it's that he had a problem getting here. So let's recall it later, right after the calendar call.

MR. BENFORD: All right. Your Honor, I also – assuming you accept this motion to dismiss, I also intend to submit to the Court the motion for entry of decision as to Petitioner Tamara A. Tello, in accordance with the agreement I signed with her back in November.

THE COURT: Yes. Okay. I will grant that. And also if you could lodge -- do you have a written motion to impose sanctions?

MR. BENFORD: I do.

THE COURT: All right.

MR. BENFORD: Your Honor, it's called a written motion. I presupposed that Mr. Tello would show up today so there's a sentence in there with that supposition. That needs to be revised if in fact he does not show up.

THE COURT: Right. Let's recall that.

MR. BENFORD: Do you want the motion to dismiss As to John Tello right now?

THE COURT: Yes. Lodge that.

MR. BENFORD: Your Honor, attached to it are Exhibits A and B. A and B are official records, a transcript indicating Mr. Tello did not file federal income tax returns for the years 1998-2000.

THE COURT: Okay. Thank you, Mr. Benford.

MR. BENFORD: Thank you, Your Honor.

(Whereupon, the calendar call was concluded.)

ON THE RECORD REPORTING
(512) 450-0342

Certificate of Transcriber and Proofreader
ON THE RECORD REPORTING INC.
Case Docket No. 19480-02
Case Name John Tello and Tamara A Tello

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 5, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Barbara Wall on June 21, 2004 before the United States Tax Court at its session in Dallas, Texas in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

/s/ Carol A. Bourgeois	Carol A. Bourgeois /s/ KFR [13]	07/04/2004
(Signature Transcriber)	(Transcriber Name)	(Date)
/s/ Sunny L. Peer	Sunny L. Peer /s/ KFR [13]	07/16/2004
(Signature Transcriber)	(Transcriber Name)	(Date)

ON THE RECORD REPORTING
(512) 450-0342

[13] Visual inspection by an untrained eye suggests one hand signed for both people. Also, neither certifying party has "KFR" for initials.

2004 Jun 21 Transcript Vol. 2 of 21 June 2004

[Tr. pp.2-6 [A-25 to -29]—Implied order admitting unsworn "testimony" from BENFORD]
[Tr. p.2 [A-25]—Order allowing Respondent to present case]
[Tr. pp.4-6 [A-27 to -29]—Motion for sanctions. Order granting sanctions, Tr. p.5 [A-28]]

037
U.S. TAX COURT

DOCKET NUMBER: 19480-02

In the Matter of:

JOHN TELLO & TAMARA A. TELLO,
Petitioners,
vs.
COMMISSIONER OF THE INTERNAL REVENUE,
Respondent.

Pages: 1-7

Location: Dallas, Texas

Date: June 21, 2004

RECEIVED
ADMINISTRATIVE OFFICE
'04 JUL 20 P 3 :32
UNITED STATES
TAX COURT

On the Record Reporting, Inc.
3307 Northland Drive, Suite 315
Austin, Texas 78731
(512) 450-0342

ORIGINAL [⊥ 1]

UNITED STATES TAX COURT

In the Matter of:	)	
JOHN TELLO & TAMARA A. TELLO, Petitioners,	)	
vs.	)	Docket No. 19480-02
COMMISSIONER OF THE INTERNAL REVENUE, Respondent.	)	

Room 591
Federal Building
207 S. Houston Street
Dallas, Texas

Monday,
June 21, 2004

The above-entitled matter came on for calendar call, pursuant to notice, at 11:15 a.m. [14]

BEFORE: HON. DIANE L. KROUPA
Judge

APPEARANCES:

On behalf of the Petitioner:
NONE

On behalf of the Respondent:
GARY BENFORD, ESQ.
Internal Revenue Service
4050 Alpha Road, 13th Floor
Dallas, Texas 75244

ON THE RECORD REPORTING
(512) 450-0342 [⊥ 2]

---

[14] 11:05 is likely. *See* p.6 [A-29]: recall concluded at 11:14.

PROCEEDINGS

THE CLERK: From page 6 of the calendar, Docket Number 19480-02, John Tello and Tamara A. Tello.

MR. BENFORD: Gary Benford for Respondent, Your Honor.

THE COURT: Good morning. Mr. Tello? Mr. Tello?

(No response.)

THE COURT: It is approximately 11:05, and Mr. Tello is not in the courtroom. Respondent has lodged a motion to dismiss for failure to prosecute. Is that correct?

MR. BENFORD: That is correct, Your Honor.

THE COURT: All right. Now, the Court is well aware that Mr. Tello has had quite a bit of communication with you and the Court knows that he has had quite a bit of communication with me, with the Court. So I will let you present your case.

MR. BENFORD: Your Honor, first of all, I would like to advise the Court, if you look at the motion to dismiss I prepared, you will see those numbers are very small in lieu of the deficiencies that were originally determined. I want the Court to know that is in no part due to the efforts on the part of Mr. Tello. Respondent went to great efforts to subpoena third parties, to get

documents, to do declarations, to have a revenue agent come on two different occasions and prepare computations.

Respondent met with John Tello on three occasions to try and enter stipulations or stipulations of settled issues of this case. As late as late April of this year, Respondent offered the concessions you see there, not in terms of those dollar amounts, but in terms of the issue. I had not yet computed the dollar amounts. But he was well aware of the fact that we were offering to concede the vast majority of this case.

Again, it has nothing to do with efforts on his part. It has to do with efforts on Respondent's part that the deficiencies have been cut down that much. He has continually violated the rules of this Court, causing great expense on the part of Respondent's counsel in preparing for this case.

As late as Wednesday of last week, he continued to tell me he was going to court this week. Therefore I continued to make preparations. I have a stack of documents three times this thick of various alternative proposals to file today, depending on what happened. I brought over boxes of documents, we copied boxes of documents. We made numerous declarations.

He's just wasted a lot of the taxpayers' money in continuing to pursue this matter. And I don't think

that the fact that he didn't show up today should allow
him to escape sanctions under Section 6673. Your Honor, I
have prepared a motion to that effect.
The one thing I have to change, I did make --
the original motion has 20 paragraphs. I have stricken
paragraph 18 by hand today, so it is not included. It
includes Exhibits A through G. You will note in there
that he has openly admitted on numerous occasions he knew
Respondent wouldn't accept his arguments. He admitted
that he knew this Court wouldn't accept his arguments.
Nevertheless, he continued to waste Respondent's and the
Court's time.
At this time, Your Honor, I would like to file
Respondent's motion for sanctions under IRC Section 6673
as to Petitioner John Tello.
THE COURT: Okay. And what amount are you
recommending to the Court?
MR. BENFORD: Your Honor, I didn't recommend an
amount. I would have recommended $25,000 had he showed up
today. I think due to the fact that he didn't show up
that he is entitled to some small deference to that
amount, but not much.
THE COURT: All right. Because the Court

24 was -- he had really tried the Court's patience, and I
25 would have been inclined to impose the $25,000 as well.

1	But I am well aware that Mr. Tello is very litigious,
2	very familiar with the Fifth Circuit Court of Appeals. I
3	am not inclined to have this decision document overruled
4	by the Court of Appeals because I have imposed too high of
5	a penalty.
6	What a lot of the other judges on the Tax
7	Court do is to ask Respondent for a recommended amount, so
8	that at least there is some record and that the Court is
9	not coming up with this amount willy-nilly. Some of the
10	judges will base it upon the amount of the deficiency, a
11	percentage of the deficiency.
12	And here, based upon the lower amount of the
13	deficiency, we are talking about $4,500. So the Court at
14	this time is going to impose a penalty against Mr. Tello
15	in the amount of $2,500.
16	MR. BENFORD: Very well, Your Honor. May I
17	approach the Court?
18	THE COURT: Yes. And the Court will grant
19	Respondent's motion to dismiss Petitioner John Tello for
20	lack of prosecution and then so the record is clear, the

21		Court will grant Respondent's motion to impose sanctions
22		against Petitioner John Tello in the amount of $2,500.
23		And the Court would also like to take this
24		opportunity to advise Mr. Tello -- I understand that he is
25		not in the courtroom. But if he continues to bring these
		ON THE RECORD REPORTING *(512) 450-0342*

1		kind of arguments in the future, that the Court will not
2		be so lenient as to impose only $2,500 but will fully
3		explore the facts, including this action, to impose up to
4		$25,000 in the future.
5		MR. BENFORD: Your Honor, at this time,
6		Respondent would move for a motion for entry of decision
7		as to Petitioner Tamara A. Tello. Tamara A. Tello did not
8		show up today; however, Respondent reached a stipulation
9		of settled issues with her back on November 25, 2003.
10		That stipulation included dollar amounts. This motion has
11		those same dollar amounts.
12		THE COURT: All right.
13		MR. BENFORD: Attached to this motion is one
14		exhibit, and the exhibit is a proposed decision document
15		in the same amounts.
16		THE COURT: All right. The Court will grant

17		your motion.
18		MR. BENFORD: May I approach the Court?
19		THE COURT: Yes, please. Thank you, Mr.
20		Benford, for all of your hard work on this.
21		MR. BENFORD: Thank you, Your Honor.
22		(Whereupon, at 11:14 a.m., the recall was
23		concluded.)
24		
		ON THE RECORD REPORTING *(512) 450-0342*

Certificate of Transcriber and Proofreader
ON THE RECORD REPORTING INC.

Case Docket No. 19480-02
Case Name John Tello and Tamara A Tello

We, the undersigned, do hereby certify that the foregoing pages, numbers 1 through 7, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Barbara Wall on June 21, 2004 before the United States Tax Court at its session in Dallas, Texas in accordance with the applicable provisions of the current verbatim reporting contract of the Court, and have verified the accuracy of the transcript by comparing the typewritten transcript against the verbal recording.

/s/ Carol A. Bourgeois Carol A. Bourgeois 07/04/2004
/s/ KFR [15]
(Signature Transcriber) (Transcriber Name) (Date)

/s/ Sunny L. Peer Sunny L. Peer 07/16/2004
/s/ KFR [15]
(Signature Transcriber) (Transcriber Name) (Date)

ON THE RECORD REPORTING
(512) 450-034

2004 Jun 23 **Order (of Record) "unfiling" (A) mandamus documents served on trial court judge and (B) Tello's Trial Announcement**

034
UNITED STATES TAX COURT
WASHINGTON, DC 20217

JOHN TELLO AND TAMARA A. TELLO, Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On June 23, 2004, the Court received from petitioner John Tello the following entitled documents: (1) Tello's Supplemental Record Excerpts and (2) Tello's Motion for Leave to Supplement, which documents fail to comply with Tax Court Rules of Practice and Procedure,

---

[15] Visual inspection by an untrained eye suggests the same hand signed for both people, again. *See* n.13, *supra*, A-22.

specifically, Tax Court Rule 21, 23, 32, 33, and 50. [16]

Further, the Court, on June 23, 2004, also received a document entitled Petitioner's Trial Announcement from petitioner John Tello. In its Order dated May 28, 2004, the Court addressed the various and numerous documents that petitioner John Tello has submitted to this Court in this matter up to that date and the Court further warned petitioner John Tello of the possibility that the Court could impose a penalty up to $25,000 on him under I.R.C. section 6673(a) (1) if he continued to raise or advance frivolous arguments.

The Court considers all three of these documents to be a continuation of petitioner John Tello's frivolous and misguided arguments in this matter.

After due consideration and for cause, it is

ORDERED that the Clerk of the Court is directed to return to petitioner John Tello the above-referenced documents received by the Court on June 23, 2004.

/s/ Diane Kroupa
Diane L. Kroupa
Judge

DATED: Dallas, Texas
June 23, 2004

SERVED JUL 8 2004

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[16] The TCRs don't govern these documents, the originals of which were filed in No. 04-10672, *In re* John Tello (5th Cir.).

FRAP 21. WRITS OF MANDAMUS AND PROHIBITION, AND OTHER EXTRAORDINARY WRITS

(a) *Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.*

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. ***The party must also provide a copy to the trial court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.***

FED. R. APP. P. 21(a)(1) (emphasis added).

Rule 14.1(i)(iii)—No Rehearing

No rehearing sought or granted.

Rule 14.1(i)(iv)--No Judgment of different date

No judgment of date different from the opinion.

Rule 14.1(i)(v)—Statutes and Rules

Tax Court Rules—Discovery Policy

TCR 51(a)

RULE 51. MOTION FOR MORE DEFINITE STATEMENT

(a) General:
If a pleading to which a responsive pleading is permitted or required is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, then the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. *See Rules 70 and 90 for procedures available to narrow the issues or to elicit further information as to the facts involved or the positions of the parties.*

TCR 51(a) (emphasis added).

TCRs 70(a)(1) and 70(a)(2)

DISCOVERY

RULE 70. GENERAL PROVISIONS

(a) General:

(1) *Methods and Limitations of Discovery:* ... ***However, the Court expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these Rules.*** ... See Rules 91(a) and 100 regarding relationship of discovery to stipulations.

TCR 70(a)(1) (emphasis added).

(2) *Time for Discovery:* Discovery shall not be commenced, without leave of Court, before the expiration of 30 days ***after joinder*** of issue (see Rule 38).

TCR 70(a)(2) (emphasis added).

TCR 90(a)

ADMISSIONS AND STIPULATIONS

RULE 90. REQUESTS FOR ADMISSION

(a) Scope and Time of Request:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters which are not privileged and are relevant to the subject matter involved in the pending action, but only if such matters are set forth in the

request and relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. ***However, the Court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule.*** *Requests for admission* ***shall not be commenced****, without leave of Court,* ***before the expiration of 30 days after joinder*** *of issue (see Rule 38).*

TCR 90(a) (emphasis added).

TCR 100

GENERAL PROVISIONS GOVERNING DISCOVERY, DEPOSITIONS, AND REQUESTS FOR ADMISSION

RULE 100. APPLICABILITY

The Rules in this Title apply according to their terms to written interrogatories (Rule 71), production of documents or things (Rule 72), examination by transferees (Rule 73), depositions (Rules 74, 75, 76, 81, 82, 83, and 84), and requests for admission (Rule 90). Such procedures may be used in anticipation of the stipulation of facts required by Rule 91, *but the existence of such procedures or their use does not excuse failure to comply with the requirements of that Rule. See Rule 91(a)(2).*

TCR 100 (emphasis added).

Title 26

Section 7458. Hearings

Notice and opportunity to be heard upon any proceeding instituted before the Tax Court shall be given to the taxpayer and the Secretary. If an opportunity to be heard upon the proceeding is given before a division of the Tax Court, neither the taxpayer nor the Secretary shall be entitled to notice and opportunity to be heard before the Tax Court upon review, except upon a specific order of the chief judge. Hearings before the Tax Court and its divisions shall be open to the public, and the testimony, and, if the Tax Court so requires, the argument, shall be stenographically reported. The Tax Court is authorized to contract (by renewal of contract or otherwise) for the reporting of such hearings, and in such contract to fix the terms and conditions under which transcripts will be supplied by the contractor to the Tax Court and to other persons and agencies.

26 U.S.C.A. § 7458 (West 2002).

Title 28

§ 455 Disqualification of justice, judge or magistrate judge

(a) Any justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his partiality might reasonably be questioned.

28 U.S.C.A. § 455(a) (West 1993 & Supp. 2004).

§ 3002. Definitions

As used in this chapter:

(1) "Counsel for the United States" means—

(A) a United States attorney, an assistant United States attorney designated to act on behalf of the United States attorney, or an attorney with the United States Department of Justice or with a Federal agency who has litigation authority; and

(B) any private attorney authorized by contract made in accordance with section 3718 of title 31 to conduct litigation for collection of debts on behalf of the United States.

(2) "Court" means any court created by the Congress of the United States, excluding the United States Tax Court.

(3) "Debt" means—

(A) an amount that is owing to the United States on account of a direct loan, or loan insured or guaranteed, by the United States; or

(B) an amount that is owing to the United States on account of a fee, duty, lease, rent, service, sale of real or personal property, overpayment, fine, assessment, penalty, restitution, damages, interest, tax, bail bond forfeiture, reimbursement, recovery of a cost incurred by the United States, or other source of indebtedness to the United States, but that is not owing under the terms of a contract originally entered into by only persons other than the United States; and includes any amount owing to the United States for the benefit of an Indian tribe or individual Indian, but excludes any amount to which the United States is entitled under section 3011(a).

(4) "Debtor" means a person who is liable for a debt or against whom there is a claim for a debt.

(5) "Disposable earnings" means that part of earnings remaining after all deductions required by law have been withheld.

(6) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(7) "Garnishee" means a person (other than the debtor) who has, or is reasonably thought to have, possession, custody, or control of any property in which the debtor has a substantial nonexempt interest, including any obligation due the debtor or to become due the debtor, and against whom a garnishment under section 3104 or 3205 is issued by a court.

(8) "Judgment" means a judgment, order, or decree entered in favor of the United States in a court and arising from a civil or criminal proceeding regarding a debt.

(9) "Nonexempt disposable earnings" means 25 percent of disposable earnings, subject to section 303 of the Consumer Credit Protection Act.

(10) "Person" includes a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or. an Indian tribe.

(11) "Prejudgment remedy" means the remedy of attachment, receivership, garnishment, or sequestration authorized by this chapter to be granted before judgment on the merits of a claim for a debt.

(12) "Property" includes any present or future interest, whether legal or equitable, in real, personal (including choses in action), or mixed property, tangible or intangible, vested or contingent, wherever located and

however held (including community property and property held in trust (including spendthrift and pension trusts)), but excludes—

(A) property held in trust by the United States for the benefit of an Indian tribe or individual Indian; and

(B) Indian lands subject to restrictions against alienation imposed by the United States.

(13) "Security agreement" means an agreement that creates or provides for a lien.

(14) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, or any territory or possession of the United States.

(15) "United States" means—

(A) a Federal corporation;

(B) an agency, department, commission, board, or other entity of the United States; or

(C) an instrumentality of the United States.

(16) "United States marshal" means a United States marshal, a deputy marshal, or an official of the United States Marshals Service designated under section 564.

28 U.S.C. § 3002 (2000).

Title 31

Section 321. General authority of the Secretary

(d)(1) The Secretary of the Treasury may accept, hold, administer, and use gifts and bequests of property, both real and personal, for the purpose of aiding or facilitating the work of the Department of the Treasury. Gifts and bequests of money and the

proceeds from sales of other property received as gifts or bequests shall be deposited in the Treasury in a separate fund and shall be disbursed on order of the Secretary of the Treasury. Property accepted under this paragraph, and the proceeds thereof, shall be used as nearly as possible in accordance with the terms of the gift or bequest.

(2) For purposes of the Federal income, estate, and gift taxes, property accepted under paragraph (1) shall be considered as a gift or bequest to or for the use of the United States.

31 U.S.C. § 321(d) (2000).

Section 5101. Decimal system

United States money is expressed in dollars, dimes tenths, cents or [hundredths], and mills or thousandths. A dime is a tenth of a dollar[;] a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar.

31 U.S.C. § 5101 (2000).

Section 5102. Standard weight

The standard troy pound of the National Institute of Standards and Technology of the Department of Commerce shall be the standard used to ensure that the weight of United States coins conforms to specifications in section 5112 of this title.

31 U.S.C. § 5102 (2000).

Section 5103. Legal tender

United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve

banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.

31 U.S.C. § 5103 (2000).

Title 42

Section 1320b-9. National Commission on Children

(k) Donations accepted and deposited in Treasury in separate fund; expenditures; gift or bequest to or for use of United States

(1) The Commission is authorized to accept donations of money, property, or personal services. Funds received from donations shall be deposited in the Treasury in a separate fund created for this purpose. Funds appropriated for the Commission and donated funds may be expended for such purposes as official reception and representation expenses, public surveys, public service announcements, preparation of special papers, analyses, and documentaries, and for such other purposes as determined by the Commission to be in furtherance of its mission to review national issues affecting children.

(2) For purposes of Federal income, estate, and gift taxation, money and other property accepted under paragraph (1) of this subsection shall be considered as a gift or bequest to or for the use of the United States.

(3) Expenditure of appropriated and donated funds shall be subject to such rules and regulations as may be adopted by the Commission and shall not be subject to Federal procurement requirements.

42 U.S.C.A. § 1320b-9(k) (West 2003).

Rule 14.1(i)(vi)—Additional Essential Materials

Trial Court

Docket Sheet

10/26/04

UNITED STATES TAX COURT
DOCKET ENTRIES

Docket No. 19480-02 INDEX
John Tello & Tamara A. Tello
v. COMMISSIONER OF INTERNAL REVENUE

John Tello Pro Se
P. O. Box 870983
Mesquite, TX 75187-0983

Tamara A. Tello Pro Se
9 Northcrest Cir.
Rockwell, TX 75087

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0001	12/16/02	PF	PETITION Filed:Fee Paid [17]
0002	01/08/03	DPT	DESIGNATION of Trial at Dallas, TX
0003	01/31/03	ACS	ANSWER (C/S 01/30/03).
0004	01/31/03	MDJ	MOTION by resp. to dismiss for LOJ as to yr. 1999 for petr. John. (C/S 1/30/03)
0005	02/04/03	NOF	NOTICE of Filing mot to dismiss. Obj to be filed: 2/24/03
0006	05/27/03	NCA	NOTICE of Change of Address for petr. John only.
0007	06/27/03	NTD	NOTICE of Trial on 12/01/03 at Dallas, TX.

[17] Shading added.

ACT/STAT	DTE	SERVED	M
		R 12/19/02	
		B 01/08/03	
GR	03/24/03	B 03/24/03	C
		B 02/04/03	C
		R 05/28/03	
		B 06/27/03	C

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0008	06/27/03	SPTO	STANDING PRE-TRIAL ORDER attached to Notice of Trial
0009	10/23/03	MOTP	MOTION by petr. to cont. trl. or set this mot. for hearing. w/Exhs. (C/S 10-17-03) (Gen)
0010	10/24/03	O	ORDER Resp. by 11/3/03 file obj. to mot. to cont. (R-ReM 11-21-03 for Tamara)
0011	10/30/03	NOBJ	NO OBJECTION by resp. to mot. to cont. (Per Judge)
0012	11/25/03	STP	STIPULATION of settled issues between resp. & petr. Tamara. (C/S 11-24-03 on John)
0013	01/13/04	REQ	REQUEST FOR ADMISSIONS by Resp. as to Petr. John. (C/S 1/12/04)
0014	01/14/04	NTD	Notice of Trial on 06/21/04 at Dallas, TX.
0015	01/14/04	SPTO	STANDING PRE-TRIAL ORDER attached to Notice of Trial
0016	02/09/04	RESP	RESPONSE TO REQUEST FOR ADMISSIONS by Petr. J. Tello (Continued to page 2)

NO.	DATE	EVENT	FILING AND PROCEEDINGS
			(C/S 2-5-04)
0017	02/23/04	MOTP	MOTION by petr. John to sever Petr. Tamara from this case. w/Ex. (C/S 2/16/04)

ACT/STAT	DTE	SERVED	M
		B 06/27/03	C
GR	10/31/03	B 10/31/03	
		B 10/24/03	C
		P 10/31/03	
		B 01/14/04	C
		B 01/14/04	C

ACT/STAT	DTE	SERVED	M
ORD	03/31/04		

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0018	03/18/04	O	ORDER Petr. Tamara & Resp. by 4/20/04 respond or object to mot. to sever.
0019	03/24/04	NOBJ	NO OBJECTION by Resp. to mot. for severance. (C/S 3/23/04)
0020	03/30/04	RESP	RESPONSE by petr. Tamara to mot. to sever. (Per Judge)
0021	03/31/04	O	ORDER petr. John's mot. to sever is denied.
0022	04/29/04	MOTP	MOTION by petr. John for summ. judg. w/Exhs. (C/S on Resp. only 4-26-04) (Per Judge)
0023	05/24/04	O	ORDER Petr. Tamara & Resp. by 6/10/04 respond or object to mot. for sum. judg.
0024	05/24/04	MOTP	MOTION by petr. John to continue trial. (C/S-Resp. 5/18/04 (per Judge)
0025	05/26/04	MOTP	MOTION by petr. John to shift burden of proof. (per Judge)
0026	05/27/04	OBJ	OBJECTION by Resp. to Petr. John's mot. for summ. judg. Exhs. & Afft. Att'd. (C/S 5-26-04)
0027	05/28/04	O	ORDER Petr. John's mot. to continue, mot. for summ. judg. & mot. to shift burden of proof are dn. Court's 5/24/04 order is vacated such that no response to Petr. John's mot. for summ. judg. is due.
	[06/14/04]	[R-t]	**[R.E. 17 "Secret Ruling"]**
	[06/15/04]	[R-t]	**[R.E. 18 "Secret Ruling"]**
0028	06/15/04	MOTP	MOTION by petr. John for stay. w/att. (C/S 6-11-04)

ACT/STAT	DTE	SERVED	M
		B 03/19/04	C
		B 03/31/04	C
		B 03/31/04	C
		P 05/24/04	C
ORD	05/28/04		
ORD	05/28/04	B 05/24/04	C
ORD	05/28/04	P 06/01/04	C
ORD	O5/28/04	B 06/01/04	C
		B 06/01/04	C

[Order]	[No Entry]	?	
[Order]	[No Entry]	?	

DN	06/16/04	B 06/17/04	C

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0029	06/21/04	HEAR	HEARING before Judge Kroupa at Dallas, TX. Also called 6-21-04 & 6-23-04. 6-23-04 Order directing return documents—See Order dated 6-23-04
0030	06/21/04	MOTR	MOTION by resp. for entry of decision as to Petr. Tamara
0031	06/21/04	MOTR	MOTION by resp. to dismiss for LOP as to Petr. John.
0032	06/21/04	MOTR	MOTION by resp. for sanctions re:Sec. 6673 as to Petr. John.
0033	06/21/04	PTM	PRE-TRIAL MEMORANDUM by Resp. (C/S 6-4-04)
0034	06/23/04	O	ORDER Clerk is directed to return to Petr. John the documents

(Continued to page 3)

NO.	DATE	EVENT	FILING AND PROCEEDINGS
			received from him on 6-23-04 that are listed herein.
0035	07/08/04	ODD	ORDER OF DISMISSAL AND DECISION ENTERED, Judge Kroupa. Resp. mot. for entry of decision and mot. to dismiss are granted.
0036	07/20/04	TRAN	TRANSCRIPT of 6/21/04 rec'd. (Cal Call)
0037	07/20/04	TRAN	TRANSCRIPT of 6/21/04 rec'd. (Recall)

ACT/STAT	DTE	SERVED	M
ORD	07/08/04	P 07/08/04	C
ORD	07/08/04	P 07/08/04	C
ORD	07/08/04	P 07/08/04	C
		B 07/08/04	C

ACT/STAT	DTE	SERVED	M
		B 07/08/04	C

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0038	10/05/04	MISC	TELLO'S FIRST NOTICE OF LIEN, with his Judicial Ethics Complaint, his Attyorney [18] Ethics Complaint, and his Request for a Board of Inquiry-LODGED.

APPELLATE PROCEEDINGS

NO.	DATE	EVENT	FILING AND PROCEEDINGS
0039	10/05/04	NOA	NOTICE OF APPEAL by John Tello to U.S.C.A. 5th Cir. FEE PAID
0040	10/22/04	NOFC	NOTICE of Filing with copy of Not. of App. sent to the parties.

[18] As such in original.

ACT/STAT	DTE	SERVED	M

ACT/STAT	DTE	SERVED	M
		B 10/22/04	C
		B 10/22/04	C

2003 Oct 15 Supplemental Stipulation of Facts

[Note: BENFORD first tendered this with his "Objection" to Tello's summary judgment motion. *See* Docket Entry 0026, Ex. D, filed 27 May 2004. *Italics* indicates handwriting.]

UNITED STATES TAX COURT

JOHN TELLO and	)	
TAMARA A. TELLO,	)	
Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent.	)	

SUPPLEMENTAL STIPULATION OF FACTS

In accordance with Tax Court Rule 91(e), the below-signed parties agree to this Stipulation of Facts pursuant to the general terms of this preamble unless specifically expressed otherwise. All stipulated facts shall be considered true. All stipulated exhibits shall be considered authentic. All copies shall be considered electronic reproductions of the originals and shall be treated as if originals. The truth of assertions within stipulated exhibits may be rebutted or corroborated with additional evidence. ~~All evidentiary objections are waived unless specifically expressed within this stipulation.~~ */s/ JT* Unless stated otherwise, "petitioner" refers to Petitioner ~~John Tello.~~ *JOHN THOMAS TELLO /s/ JT*

23. ~~Petitioner was born on January 19, 1958.~~ *don't agree /s/ JT*

24. Petitioner did not file Federal income tax returns for the taxable years 1996, 1997, 1998 and 2000.

25. Respondent computed petitioner's Federal income tax liabilities based largely on information supplied by

third parties. ~~Petitioner has not asserted any dispute regarding third-party information returns.~~ */s/ JT*

DKT. No. *19480-02*
EXH. *D*

26. Petitioner's ~~tax identification~~ *Social Security number . . /s/ JT* number is [XXX-XX]-6045 [19]

27. Respondent issued four separate Notices of Deficiency, for the taxable years 1996, 1997, 1998 and 2000, to petitioner on September 18, 2002. Copies of the Notices of Deficiency are attached hereto as:

Exhibit No.	Year
21-J	1996
22-J	1997
23-J	1998
24-J	2000

28. At the time he filed his petition in this case, petitioner resided at 9 Northcrest Circle, Rockwall, Texas 75087.

29. Petitioner was married to and lived with Tamara A. Tello, Taxpayer Identification Number [XXX-XX]-2053, at all times during the years 1996 through 2000.

30. Petitioner ~~realized gains~~ *had proceeds /s/ JT* from the sale or exchange of assets for the years 1996, 1997, 1998 and 2000 *according to JB Oxford & CO reports provided to IRS. /s/ JT* as follows:

Year	Amount
1996	$122,977.00
1997	$1,454,004.00
1998	$10,055.00
2000	$10,220.00

[19] No end punctuation in original.

31. Petitioner made withdrawals from his Individual Retirement Accounts for the years 1996, 1998 and 2000 as follows:

Year	Amount	
1996	$62,500.00	
~~1998~~	~~$ 5,000.00~~	*/s/ JT don't agree*
~~2000~~	~~$25,000.00~~	*/s/ JT*

36. Copies of respondent's Certificates of Official Record of information returns for petitioner for the years 1996, 1997, 1998 and 2000 are attached hereto as:

Exhibit No.	Year
29-J	1996
30-J	1997
31-J	1998
32-J	2000

EMILY A. PARKER
Acting Chief Counsel
Internal Revenue Service

/s/ John Tello, Trustee By: */s/ Gary A. Benford*

JOHN TELLO
Petitioner
P.O. Box 870983
Mesquite, Texas 75187-0983
Telephone: 214-564-9664

GARY A. BENFORD
Area Counsel
(Small Business/Self-Employed)
Tax Court Bar No. BGO116
4050 Alpha Road, 13th Floor
MC 2000 NWSAT
Dallas, TX 75244-4201
Telephone: 972-308-7900

Date: *10/15/2003*

Date: *10/15/2003*

[20] The original did not include a page "- 3 -".

2004 Jan 12 BENFORD's Request for Admissions

[Note: This is an excerpt from Request Ex. 8. Request Exs. 5 (1997), 6 (1996) and 7 (1998) show the exact same figure and the exact same certification language, even by the exact same official. *Italics* indicates handwriting.]

PAGE 2 OF FORM 4340 (2000), REQUEST EX. 8 P.3

CERTIFICATE OF ASSESSMENTS, PAYMENTS, AND OTHER SPECIFIED MATTERS

JOHN TELLO EIN/SSN: [XXX-XX]-6045
[XXX-XX]-2053

TYPE OF TAX: U.S. INDIVIDUAL INCOME TAX RETURN

FORM: 1040 TAX PERIOD: DEC 2000

BALANCE 0.00

I CERTIFY THAT THE FOREGOING TRANSCRIPT OF THE TAXPAYER NAMED ABOVE IN RESPECT TO THE TAXES SPECIFIED IS A TRUE AND COMPLETE TRANSCRIPT FOR THE PERIOD STATED, AND ALL ASSESSMENTS, ABATEMENTS, CREDITS, REFUNDS, AND ADVANCE OR UNIDENTIFIED PAYMENTS, AND THE ASSESSED BALANCE RELATING THERETO, AS DISCLOSED BY THE RECORDS OF THIS OFFICE AS OF THE ACCOUNT STATUS DATE ARE SHOWN THEREIN. I FURTHER CERTIFY THAT THE OTHER SPECIFIED MATTERS SET FORTH IN THIS TRANSCRIPT APPEAR IN THE OFFICIAL RECORDS OF THE INTERNAL REVENUE SERVICE.

SIGNATURE OF
CERTIFYING OFFICER: */s/ Nancy Farthing*

PRINT NAME: *Nancy Farthing*

TITLE: *Manager, Special Services Unit*

DELEGATION ORDER: *AUSPC-2 (Rev. 1)*

LOCATION: INTERNAL REVENUE SERVICE

ACCOUNT STATUS DATE 10/01/2003

FORM 4340 (REV. 01-2002) PAGE 2

2004 Apr 26 Tello's Final Settlement Offer

[Note: BENFORD tendered this as Ex. F with his "Objection" to Tello's summary judgment motion. *See* [0026], filed 27 May 2004.]

April 26, 2004

John Tello
P.O. Box 870983
Mesquite, Texas 75187

Gary A. Benford
Area Counsel
(Small Business/Self-Employed)
4050 Alpha Road, 13th Floor
MC 2000 NWSAT
Dallas, TX 75244

Via Facsimile: (972) 308-7970
In prep for 1:30 p.m. meeting

Re: TELLO and TELLO v. COMMISSIONER, Docket No. 19480-02

Dear Mr. Benford:

I appreciate your making time for me during a busy schedule.

As for the newest set of proposed stipulations, first shown to me during our meeting on Friday, April 23d, I respectfully decline to agree to them, in their entirety. From the Request for Admission you submitted, we have one set of agreed matters already. In the proposed Stipulations that followed, you specifically intended to end run your own discovery by having that set of Stipulations look to additional and future evidence, rather than back to the discovery questions and answers already of Record. And, in this most recent set of Stipulations, while it's true that you have adopted "my" figures for purposes of various "gain" or "income" amounts, I understand much better Friday's pressure to sign, for where the loss or expense amounts are just as verifiable, you have (1) not included them and (2) declined, under various dubious statements of where your "jurisdiction" extends, to include figures supporting my numeric, accounting and evidentiary side.

Therefore, since you've played these clever games with me for at least three times now, which count doesn't include the matter with your November settlement agreement with Tamara, because I can't *prove* that you didn't send it to me at that time, I'm asserting that we're done with your Stipulations game. There are no Stipulations, and there will be no Stipulations. If I'm going to be burdened with proving up the obvious in order to put into evidence my losses and expenses, you're going to be burdened with proving up whatever it is you're going to need to prove up. I have worked with you in full disclosure and in good faith, and, in return, you've played these clever games with me, thinking that because I'm pro se, you can get by with it. Since you've played the games in the past, I anticipated it this time. Having reviewed over the weekend the one-sided figures you've proposed, I'm all the

DKT. No. *19480-02*
EXH. *F*

[⊥ 2] more satisfied in having declined to yield to the high pressure opportunity to buy into your approach and perspective on the matter. There will be no more games.

One key example has to do with net operating loss carryforwards. You've denied the applicability of 1995 for purposes of 1996 figures, claiming "no 1995 jūrisdiction" which is a flatly and ridiculously frivolous position. We're not talking about *1995*, but *1996*, and you most certainly *do* have "jurisdiction" to talk about *1996*. You're the attorney, and yet you say that your opinion is dependent upon what "appeals" gives you permission to Stipulate to? Plus, since part of the NOL derives from the Schedule D, and since I showed you the original documents reported in the 1995 Schedule D, and since you didn't even want copies in order to pass along to your "appeals" people for verification and review, the only conclusion is games and stonewalling. There is another conclusion, but I'm not sure it's proper to identify squarely the independent judgment of litigation counsel type of problem that it sounds like to me, so I'll suffice with saying that I don't buy for an instant that you lack authority to Stipulate this entire case. Further, you've not included any NOL carryforwards for any year at issue, leaving me with the burden of proving up those figures, while you want to skate with having no burden to prove up the "gain" side of those very same transactions and years, generally. If you have law for denying the NOL, let's see it. Otherwise, you're negotiating in bad faith.

Another key example is the subtle attempt to get me to waive my preferred accounting method. The 1040 method, to which all America is brainwashed, is not the method I'm using. I'm using the 1041 method, because that form includes the Generally Accepted Accounting Principles ("GAAP") for trusts, which GAAP are properly

presented in the 1041 and in no other publically [21] and generally available form. I'm sorry you're still having problems accepting the fiduciary character of the "federal income tax system" obligation, but your problem will remain right there and not spill over to me, for I have no intention of waiving my right to pick my preferred accounting method, and I pick the 1041 method. Thus, the game of my agreeing not only *solely* to "gain" figures, but also to "gain" figures to be plugged into a 1040 accounting method by "appeals" is simply not going to work, here. Unless you can show me the authority by which you may compel me to adopt a 1040 accounting method, there will be no use of any 1040 accounting method in this case.

In my previous letter, I specifically asked for a bottom line settlement figure from you, and you have responded with still more games with one-sided figures and without providing any bottom line. Therefore, I'm including and offering this "take it or leave it" bottom line figure for settlement. You do whatever you want or need to do administratively, with or without "appeals," but if I don't have, in hand, a signed writing from you agreeing to this settlement proposal by noon, in Dallas, [⊥ 3] Texas, on Friday, May 14th, then this offer is withdrawn. Time is of the essence.

Incorporating my 1041's for 1995, 1996, 1997, 1998 and 2000, copies of which you have and which have been made available to you for your review and consideration, I offer the following amendments, based upon our discussions to date, which amendments are the basis for my offer, which I here tender, in order to terminate the litigation, of the sum of 2,678 to settle all four years at issue.

---

[21] As such in the original.

1996

[various calculations omitted showing a final amount of 0.00] [⊥ 4]

1997

[various calculations omitted showing a final amount of 0.00] [⊥ 5]

1998

[various calculations omitted showing a final amount of 193.00] [⊥ 6]

2000

[various calculations omitted showing a final amount of 2,485.00] [⊥ 7] [⊥ 8]

Settlement Offer

Thus, where the original offer was 3,000, this offer is for 2,678, and it's my final offer to settle.

Enclosed is my promise in discharge for 2,678.

Also enclosed, per our discussion, are the exact property tax amounts. The extrapolated figures are shown in the grey shading.

I look forward to hearing from you.

Sincerely,

/s/ John Tello
John Tello

Encls. Check for 2,678 (hand delivered at meeting)
Property Tax figures (hand delivered at meeting)

cc: Mr. David L. Korb (CM-RRR)
Chief Counsel
Washington, D.C.

2004 Apr 26 **Tello's Motion for Summary Judgment**

[U.S. TAX COURT]
[F I L E D]
[APR 2 9 2004]

022

UNITED STATES TAX COURT

JOHN TELLO and	§	
TAMARA A. TELLO	§	
Petitioners,	§	
v.	§	Docket No. 19480-02
COMMISSIONER OF	§	
INTERNAL REVENUE,	§	
Respondent.	§	

JOHN TELLO'S
MOTION FOR SUMMARY JUDGMENT

Motion for Summary Judgment

Pursuant to Tax Court Rule 121, and Federal Rule of Civil Procedure 56, John Tello ("Tello") moves that he be granted final judgment via summary judgment on all years at issue in this matter.

Discussion

Since there are no genuine issues of material fact and since Tello is entitled to final judgment for all Fiduciary Years at issue as a matter of law, Tello here moves for summary judgment on all years at issue. While this motion will not, and does not intend to, resolve any matters regarding Tamara A. Tello, who seems to have reached a final settlement agreement in this matter back in November, 2003, this motion does intend to resolve all issues involving John Tello, and thus, with respect to him, intends to obtain a final resolution of all issues. [⊥ 2]

Undisputed Facts

Fiduciary Years at issue. The four Fiduciary Years at

issue are 1996, 1997, 1998 and 2000.

"Maritime Jurisdiction." Since the entirety of the matter is recognized solely in this state, the matter is not only in maritime jurisdiction, but also all claims, parties, and etc., are either statutory, agreed to or non-existent.

"Taxpayer." Tello had a bank account for all years at issue. By signing up for that bank account, Tello voluntarily self-identified as a "taxpayer."

"Beneficiary." For all years at issue, the known and disclosed beneficiary is the "United States." 31 U.S.C. § 321(d).

"Unknown Beneficiary." The "COMMISSIONER" is unknown to the trust indenture, i.e., the Internal Revenue Code, as is a "UNITED STATES OF AMERICA," the party who asserts both the civil and criminal "income tax" claims.

"Unit of Account." There used to be a unit of account and money of account, but, for the Fiduciary Years at issue, no such thing exists in or for this state. *See* 31 U.S.C. § 5101 and its legislative history.

Request for Admission. The COMMISSIONER proposed, and Tello agreed to and admitted to various Requests for Admission, which verified Answers, "Tello's Answers to Request for Admission" ("Tello's Answers"), are already of Record. Tello relies upon that discovery as follows: [⊥ 3]

- 1996. Respondent proposed and Tello agreed and admitted that the tax liability for 1996 is zero. *See* Tello's Answers, p. 12 (Respondent's Ex. 2 (1997), page 7, line 5: Prior year tax liability (i.e., 1996)– $0.00 [Admitted]). This is not simply a happenstance figure, because the remainder of the 1997 calculations on that page depend directly upon the prior year's tax liability. Further, since both accounting methods, the 1040 and the 1041 arrive at the same tax liability figure, *see* Ex. 103-P, it follows that the distribution amount (i.e., the

"tax due") for 1996 is zero. *See also* Tello's Answers, pp. 33-34 (Respondent's Ex. 6 (1996), p. 3: Balance–$0.00 [Admitted]) (under certified IRS signature).

- 1997. Respondent proposed, under certified IRS signature, and Tello agreed and admitted that the tax liability for 1997 is zero. *See* Tello's Answers, pp. 32-33 (Respondent's Ex. 5 (1997), p. 3: Balance–$0.00 [Admitted]).
- 1998. Respondent proposed, under certified IRS signature, and Tello agreed and admitted that the tax liability for 1998 is zero. *See* Tello's Answers, pp. 34-35 (Respondent's Ex. 7 (1998), p. 3: Balance–$0.00 [Admitted]).
- 2000. Respondent proposed, under certified IRS signature, and Tello agreed and admitted that the tax liability for 2000 is zero. *See* Tello's Answers, pp. 35-36 (Respondent's Ex. 8 (2000), p. 3: Balance–$0.00 [Admitted]). [⊥ 4]

Application of Law to Fact.

Unknown Beneficiary Problem. There being no known, disclosed or proven relationship between the COMMISSIONER and the "United States," there arises an unknown beneficiary problem. Where the trustee knows who, or what class, is to be the beneficiary, but where some other claimant shows up, a dilemma develops. Where the known beneficiary, the real party in interest, makes no appearance, what obligation does the fiduciary have to the substitute?

> If there is a lack of any presumption of death or grant of power to pay a substitute, the trustee may pay the funds to any alleged successor of the absentee [beneficiary] at this peril *or hold them indefinitely*, unless he can secure protection by court order.

GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 814 (rev. 2d. ed.

1995) ("Bogert"), at 314 (emphasis added). Where the alleged fiduciary faces the "unknown beneficiary" problem, the unknown beneficiary has no competent evidence of any claim. Where the claimant represented by the COMMISSIONER remains undisclosed, there is absolutely nothing wrong with any alleged fiduciary's holding any alleged distribution *indefinitely*. And, where no fiduciary may *ever* be ordered to make an unauthorized distribution, it follows that until the *known* beneficiary asserts the complaint and the claim, the alleged fiduciary has a duty not to part with one single penny of trust property. Typical identification includes a name and an address. [⊥ 5] BOGERT § 161, at 133-34. Therefore, until someone representing the "United States" asserts a claim in this matter, the amount Tello may be *ordered* to distribute, regardless of accounting and math, is zero.

No "Unit of Account" Problem. The COMMISSIONER has provided not one shred of competent evidence of any claim. One may kick around unitless figures until the cows come home, but there is still no competent evidence of any obligation for any year at issue. Tello specifically objects to any and all figures that may arise in a response to this motion on the grounds of competence, arising from and looking to 31 U.S.C. § 5101.

Conclusion

1. Respondent's Judicial Admissions. Respondent has judicially admitted, via the documents proposed for purposes of Request for Admission, specifically in the identified Exhibits already of Record, that the balance due for each year at issue is $0.00, and Tello has agreed and admitted, by way of verified Answers to each Respondent's assertions, that the balance due for each year is $0.00.
2. Unknown Beneficiary. Respondent has yet to prove its interest in the alleged fiduciary obligation, and Tello asserts that Respondent's fulfilling that burden is a legal and logical impossibility.

3. No Unit of Account. For no Fiduciary Year at issue is there any unit of [⊥ 6] account. This renders incompetent any and all evidence that Respondent may attempt to offer in support of its alleged claims.

For these reasons, there is no genuine issue of material fact, and Tello is entitled to final judgment, that Respondent take nothing, as a matter of law.

Relief Requested

Tello requests that this court enter final judgment in his favor for all Fiduciary Years at issue that Respondent take nothing by its claims.

Respectfully submitted,

/s/ John Tello
John Tello
P.O. Box 870983
Mesquite, Texas 75187

Date: *4-26-2004*

CERTIFICATE OF SERVICE

By my signature below, I certify that on this the 26th day of April, 2004, that I served a true and correct copy of this motion and the accompanying Record Excerpts as follows:

Donald L. Korb (CM–RRR)
Chief Counsel
Internal Revenue Service
Department of the Treasury
Washington, D.C. 20224

Gary A. Benford (Via Hand Delivery)
Area Counsel
Small Business/Self-Employed
4050 Alpha Road, 13th Floor
MC 2000 NWSAT
Dallas, TX 75244-4201

/s/ John Tello
John Tello

2004 May 3 **BENFORD's Initial Response to Tello's Settlement Offer**

[Note: BENFORD tendered this as Ex. G with his "Objection" to Tello's summary judgment motion. *See* [0026], filed 27 May 2004.]

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
SMALL BUSINESS/SELF-EMPLOYED
DIVISION COUNSEL
4050 ALPHA ROAD, 13TH FLOOR
MAIL CODE 2000NWSAT
DALLAS, TEXAS 75244-4203
(972) 308-7900
FAX (972) 308-1206

MAY 0 3 2004

CC:SB:6:TL-19480-02
GABenford

John Tello
P.O. Box 870983
Mesquite, Texas 75187-0983

In re: John Tello and Tamara A. Tello v. Commissioner Docket No 19480-02

Dear Mr. Tello:

I want to again express my disappointment that you continue to choose not to enter into any sort of meaningful stipulations of facts in this case. I have enclosed for your benefit a copy of the Tax Court's opinion in Snyder v. Commissioner, T.C. Memo. 2001-255. Please note the Court's finding that the purported trust's income was attributable to the taxpayers for several reasons. First, the trust was a sham with no economic substance. Second, the trust income was taxable to the taxpayers

under the "grantor trust" rules of I.R.C. Section 671. Third, the trust income was taxable to the taxpayers based on the fundamental principle that income is taxed to the person who earns it. Fourth, the trust income was taxable to the taxpayers under I.R.C. Sections 652(a) and 662(a), which provide that certain trust amounts are includible in gross income of the beneficiaries.

Also note that the Court imposed a penalty of $15,000 under I.R.C. Section 6673(a)(1) for instituting or maintaining the proceeding primarily for delay, or for maintaining a position that is frivolous or groundless. In support of its imposition of the penalty, the Court cited the taxpayers' failure to cooperate in the examination and preparation of their case for trial, including their refusal to stipulate to certain documents.

DKT. No. *19480-02*
EXH. *G*

If you have any questions, please call me.

Sincerely,

/s/ Gary A Benford
Gary A. Benford
Area Counsel

Enclosure:
As stated

2004 May 5 Tello's Full Disclosure and Due Diligence Letter

RECEIVED
DALLAS
MAY - 6 2004

May 5, 2004

OFFICE OF CHIEF COUNSEL
FOR THE IRS

John Tello
P.O. Box 870983
Mesquite, Texas 75187

Gary A. Benford
Area Counsel
(Small Business/Self-Employed)
4050 Alpha Road, 13th Floor
MC 2000 NWSAT
Dallas, TX 75244

Via Regular Mail (only)

Re: TELLO and TELLO v. COMMISSIONER, Docket No. 19480-02

Dear Mr. Benford:

I appreciate your time in preparing the letter of May 3, in discussing this matter and for the fairly recent Tax Court Memo Opinion, *Snyder v. Commissioner*.

If we were talking about a separate entity that was a trust, and if that entity was set up under this mindless "patriot" perspective that having such a trust somehow negates the "income tax" obligation, then I would be, sooner or later, grateful for your concern and would at least have the opportunity at this stage to purge such disastrous legal perspective from my mind and resolve this matter.

But therein lies a critical distinction between that case and my position. I'm not saying that there's a separate entity, nor am I saying that because we're talking about a fiduciary obligation that I'm somehow "magically"

immune from the "income tax" obligation. In short, I don't see how *Snyder* applies, at all.

Because this is, in general, a matter of concern to you, I'm more than glad to take the time to return the favor and explain to you my concern. And, by doing so, I hope you'll understand, sooner or later, that this position I'm taking has absolutely nothing to do with you, personally. I have a great respect for you, personally and professionally, and if we had met under different circumstances, I'm sure we'd enjoy shooting the bull together from time to time.

Since you are Area Counsel, I can guess that you've made civil service your career, and for that reason, I can surmise, safely, that you feel you are "serving your country" in this way. I have a profound respect for that perspective. And, because I'm entering into this particular segment of our discussion of this tax matter with that understanding and premise, I'm also expecting that there's not a lot of what

DKT. No. *19480-02*
EXH. *H*

[⊥ 2] I'm going to share with you here that you're really going to want to know. Why? Because in the moment that you start to "see" the legal perspective that I'm sharing with you here, you'll also "see" that this "income tax" scam is nothing but an attack *against* the country and the people you want to serve. My very genuine concern is that what you'll end up with is a question as to the basis of your career, maybe your life, and at first, I have no way to mitigate those questions, or that hollow, incessant, dull burning pain, in body and mind, that takes a while to live through. Just know that should what I'm sharing with you here ever start to take hold in your mind and ring true, in any part, that you'll be serving your country by getting a handle on the legal reality that I'm

going to set forth, at least in part, in this note to you. It's not a waste of career or of life, if, by those prior experiences, we're in a position to understand what we might never have understood otherwise.

In sum, what I'm saying is that I understand how this God-forsaken scam works, and that at the heart of the legal mechanism that is called the "federal income tax system" *is* an obligation that is a voluntarily entered into fiduciary obligation. I'm not saying that there's a separate entity, as was the fact pattern in the *Snyder* case you generously provided me. What I'm saying is that the "income tax" obligation, itself, *is* the fiduciary obligation.

Let me try to simplify the matter this way. "Taxpayer" means "fiduciary." I don't know how to make it more plain or simple than this. "Taxpayer" means "fiduciary."

Look up the definition for "taxpayer." Now, if you can, in clear and competent conscience tell me that such language, at IRC § 7701(a)(14), is anything but circular, then we'll have a problem for the remainder of this discussion. From my side, it's impossible to have any other perspective on that "definition" than to characterize it as circular.

Therefore, the "definition" of the term "taxpayer" *must* come from some other source. And, that source is "usage." Let me borrow a few of ideas from the Uniform Commercial Code. There are the ideas of "course of performance," "course of dealing," and "course of trade." And, in those ideas are generic concepts that "usage" "defines" terms of the agreements. We could define terms by example. To define a color to a blind person is next to impossible, for we get the definition by example. This is blue, because that's how this color is defined. We could define terms by description. Such is the normal and typical method of defining terms for legal use and purposes. A "table" is a flat, firm surface, horizontal to

the ground, typically supported by three or four legs. This is what *should* be the method of definition of the term "taxpayer." But, the insidiously evil people who set up this [⊥ 3] "income tax" scam needed to play games with our heads. So, they hid the actual definition of the term "taxpayer" in the same commercial transaction during which the voluntary act occurs.

In general, regarding my perspectives, I expect you'll reject them, at least at first. You may forever reject them. What could I possibly know about these ideas, having never been to law school? So, we've got a threshold credibility gap, and I don't know what to do about that except to tell you my position, as clearly and as plainly as I know how, and, as necessary, if necessary, have some external authorities that are popularly accepted as credible confirm the validity of it. That's not intended in *any* way to be bolstering of some crapola legal positioning. It's nothing more than the statement of reality of the fact that I know that because I'm not only pro se, but also without any formal legal training, that, at the end of the day, the only real authority you'll recognize is that of some court or other. It's just how it is, and I think we'll both have to see that as our functional reality. You're Area Counsel. Who in the world am I, as a non-legally educated or trained pro se, to pretend to teach you about the legal reality of the "income tax system?" It's just "nuts," on the threshold surface of the matter.

And yet, where the administrative process and the courts, including the Tax Court and the 5th Circuit, have supported what I'm sharing with you here, rather quietly, but supported nonetheless, what I'm very much hoping to do is save some professional embarrassment. All I can do is present the case. I have to leave the rest to God.

While I can invest all the time I may have in trying to explain to you why I can't agree solely to what is on the table at present, and must insist that my accounting

method, and those results, be included in those agreed facts, or else there will be no agreed facts, at the end of the day, if this doesn't make any sense to you, it may just be that now is not the time when I will be able to show you these details. There may never be a time where information coming from me will cause a change in understanding, at *this* foundational level, in something you've invested your career putting into practice. And, there's also the possibility that there may be no one on the face of the planet who could motivate a change in understanding about how this "federal income tax system" actually functions.

But, I can tell you that should that day arrive, and should you keep this letter and review it on that day, or not long thereafter, you'll see that I did go to the trouble to explain at least this much of it to you during this matter, at this time, and for all of the reasons already mentioned. [⊥ 4]

Let me complete the source and manner of definition of the term "taxpayer," and then I'll fill in some additional background. The primary place anyone volunteers to become a "taxpayer" is with and at the bank. How so? Here are a couple of scenarios that intend to describe the matter. If one wants to rent an apartment, what does the landlord ask for? The Social Security Number ("SSN"), right? OK. So, the landlord checks the "credit," and finds it at the highest rating, and asks if the one wouldn't like to rent two, or three, apartments. The renter is interested only on the one, and so the deal is made.

But, what does the bank ask for when applying for a checking account? It's not the "Social Security Number." It may look like the SSN, with the digits being exactly the same, and in the same sequence, and punctuated exactly the same. But it's not the same. What the bank asks for is the "Taxpayer's ID Number." When one fills out that form, puts a number in that particular box, and signs it,

that person has, at just that instant, also volunteered to be a "taxpayer."

As you review your files for the past however many years you'd like to go back, see how many "taxpayer's" you've had cases with that weren't also people (or businesses) with bank accounts. You may actually find one, but my guess is that you'll find very, very few. Whatever the total number of cases you've handled in your career, you'll be able to count on one hand the number of people (and businesses) to whom a notice of deficiency was sent who *didn't* have a bank account.

Read the criminal tax cases. You'll not find one published criminal tax case where the party isn't somehow identified as having a bank account, or at least some similar financial, commercial nexus that clearly suggests the existence of such.

I realize that you're likely presently shaking your head in disbelief that you're even taking the time to read this far, but here's the thing. I know that "taxpayer" is defined by "use." And, I know that "taxpayer" is defined by "use" most commonly by the agreements entered into by and through the banks. There simply are not that many places, anywhere in the country, where the term "taxpayer" is found commercially. Since the term "taxpayer" is not competently defined in the Code, itself, but since that term must be satisfied, for the Code applies only to "taxpayers," the only remaining place to find a definition is commercially, by "use." And, the most common place where that term, "taxpayer," is found commercially is with the banks and their forms.

I'll spare you the volumes that could be discussed on the reality of the "federal reserve system." I'll simply stop with telling you that it's an evil system, which has its purpose in this time and place. I don't fault them for doing "their job," [⊥ 5] because someone has to do it, but I can tell you that I don't have very much positive to say

about the "federal reserve system." Banking is not the problem. It's this particular system of banking that is the problem. And, I'll simply stop there.

While I'm not going into any more detail about the present banking system, what I'll specifically direct your attention toward is 31 U.S.C. § 321(d). Why? Because where there is the appearance of a fiduciary obligation, there are certain elements to be satisfied regarding the trust. For there to be a trust, there must be a trust *res* and a beneficiary. Where there is a vacancy in the office of fiduciary, a court of competent jurisdiction may fill that office. But, where there is no trust *res*, or where there is no beneficiary, there simply is no trust obligation.

The stated beneficiary for this particular trust, the trust obligation set up the instant someone signs up at the bank and self-identifies as a "taxpayer" by filling in the "Taxpayer's ID Number" box or line on that account application form, is called the "United States." How do we know? It says so, right there in 31 U.S.C. § 321(d). Now, go look at every single civil or criminal tax case you'd like to find. Who is the party bringing the suit or charge? It's the "UNITED STATES OF AMERICA." If the "United States" and the "UNITED STATES OF AMERICA" seem to you upon this reading to be one in the same entity or party, then, in addition to reading IRC § 7405, regarding the party with the authority to sue to get back an overpayment of refund ("United States," not "UNITED STATES OF AMERICA"), or Federal Rule of Civil Procedure 17, regarding the real party in interest ("United States," not "UNITED STATES OF AMERICA"), you'll also find Black's Dictionary (of almost any edition) helpful. In some editions, there may actually be a definition of both. But, where *that* dictionary only has one definition, one can't help but stop and pause and ask why one is defined, but not the other, and why there's no "See" or "also known as" (the other) as a cross reference. On

first exposure to this, unless the mind is already aware of the head games that have been going on for at least 150 years, the distinction between "United States," as a very separate and distinct entity from the "UNITED STATES OF AMERICA," will just seem nuts to you. I understand that. It took me a while to accept this reality, myself.

Here's another reference along these lines. Look up 28 U.S.C. § 3002(15). What does this address? This is what tells the "federal" courts that this entity called the "United States" is a federal corporation.

If you thought the foregoing discussion on definitions was off the wall, you'll really get a laugh, "today," out of what follows. Where the "United States" is a federal corporation, it is a proprietor. It is not a "sovereign" entity, but a proprietor. It's a commercial enterprise, not a "governmental entity." "This state" recognizes [⊥ 6] nothing but commercial entities. And, I'll simply put on the table that if a corporate entity has "authority" over or against someone or some other business entity, that it obtained such "authority" by only one method. That method is generically called a "private obligation."

Private obligations come in two varieties, in general: contracts and trusts. As long as you've been with the IRS, you've got to have "heard it all." So, in your experiences will be at least one exposure to the "patriot" non-sense that the "income tax" obligation arises from contract, and that "it's all fraud." Well, that's nuts on its face. Here's how I know that.

Let's take two different forums as examples. From the Tax Court forum, we'll examine into "burden of proof." From the "federal" district court forum, in particular a criminal tax case, we'll examine into "enforcement options." If the "income tax" obligation were a contract, then the party *claiming* breach would have the burden *to prove* breach. But, what is the burden of proof matter that is set up clearly in the Tax Court setting? Where the

IRS is the party *alleging breach*, the IRS is not burdened with *proving breach*. Rather, the "taxpayer" is burdened with *proving non-breach*. From the contract view, this is completely wrong and backwards. To presume the validity of the Tax Court system, we may dismiss instantly the theory that the "income tax" obligation arises from contract. But, there's another source of support for that very same conclusion. Since there is no such thing as "debtor's prison," we know that whether "accidental" or "willful," a breach of contract is not criminally enforceable. Thus, because we see in the criminal tax context that people lose their liberty for the "breach" that is at issue, we again satisfy our minds that we're *not* talking about a contractual obligation.

Keeping in mind that a corporation derives its authority from nothing other than a private obligation, just for kicks let's run the trust theory through both of these same two scenarios and see what happens.

Where the IRS is viewed as the collections agent for the real party in interest, i.e., the "United States," then the IRS is basically trying to assert the position of the beneficiary. And, what is the ancient practice regarding placement of burden of proof in disputes between beneficiary and fiduciary? Once the beneficiary establishes (1) trust *res*, (2) that this *is*, in fact, a beneficiary of a trust alleged, and (3) that the party complained of is, in fact, the fiduciary of that trust, what happens? The burden of proof shifts to the fiduciary. Thus, once the beneficiary *alleges "breach"* (as well as the prima facie elements of the trust, and that this is the fiduciary responsible), the burden of proof shifts to the fiduciary *to prove non-breach*. This has been this way from ancient times in the law of trusts. [⊥ 7] Let's put that legal reality into the Tax Court example. Where the Commissioner *alleges breach*, the "taxpayer" (fiduciary) is burdened *to prove non-breach*. It's been that way from the

beginning. Thus, not only does the Tax Court scenario on the "burden of proof" issue prove that we're *not* dealing with a contractual obligation, it also just as instantly proves that we *are* dealing with a fiduciary obligation. To take that forward, what follows is that the "taxpayer" is the fiduciary and that the Commissioner is, or represents, or is agent for, the beneficiary (and, as a result, has a threshold burden to prove those facts).

Where the fiduciary commits a "breach of trust," is there criminal liability? Yes. In some contexts it's called "willful misappropriation." In some other contexts, it's called "embezzlement." By whatever label, and IRC § 7201 calls it "tax evasion," the reality is plain: the "income tax" obligation *is* criminally enforceable. And, who is it that is charged? The "taxpayer." Thus, again, we see full consistency with the fiduciary obligation as the root mechanism by which this "federal income tax system" functions.

If you want to discuss the "maritime law" and how that affects this, we can discuss that sometime. For now I'll simply include that idea here, and get back to a couple key points already mentioned.

Why I'm taking such a firm position regarding Stipulations is simply this. The game is over. Americans have "been had." We've "been had" all of our lives. We're no more supporting a "constitutional Government" with this "income tax" system than we're supporting the man in the moon. We're tricked into becoming fiduciaries, by signing up, voluntarily, for that bank account. And, since no one may be compelled to be a fiduciary, it's either entered into voluntarily, or not at all. But, once entered into, there arises the traditional, ancient, duty to report the trust activity to the beneficiary. And, where the trust indenture, trust agreement, i.e., the Internal Revenue Code, says that a distribution is due, then the "taxpayer" is obligated, by the law of trusts, to make that

distribution to the (known) beneficiary.

Therefore, rather than closing out the bank accounts, which I'm simply not yet in a position to do, what I've opted for, instead, is being the best damned fiduciary I know how to be. There's a lot to learn here, but I'm slowing getting the hang of it. And, for example, since the 1041 is the only pre-printed form that incorporates the Generally Accepted Accounting Principles applicable to trust accounting, that's the only form that any competent fiduciary will use by which to make his report to the beneficiary. Sure, the IRS agrees to these various modified accounting methods, i.e, [22] the 1040, 1040A, etc., and those who want to use those modified accounting methods are certainly free to do so. That's their business and [⊥ 8] their decision. But, this one is my fiduciary obligation to report, etc., and since I intend to be the best damned fiduciary I know how to be, I'm going to do the reporting of the fiduciary activity by the GAAP trust accounting principles that apply. That is the accounting that I've reported administratively and that I've provided for our discussions in this particular matter.

And, here's where I'm going to "win," should this go to trial, and, thus, to appeal. (I mention appeal for two reasons. First, I don't really expect the Tax Court to cotton to this any more than you will, certainly not at first. Also, even if the Tax Court were to recognize the full reality of what I've explained here, I doubt very much they'll be terribly interested in publishing any decisions that confirms the viability of the use of the 1041, and for exactly the reasons I've already indicated: the whole thing is nothing but a scam (that is, it's not *at all* what it is marketed as being). Therefore, it's simply not prudent for the Tax Court to "go public" with that fact. The better approach is to allow those minds that are able to see

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[22] As such in the original.

through the scam to act fully lawfully with regards to the obligation, and simply handle the matters administratively, thus relatively quietly.)

First, there's no way on God's green planet that (a) the collections agent, (b) the beneficiary, *or* (c) the Tax Court, has authority to compel a fiduciary to adopt a modified accounting method. I'm going to use the 1041 accounting method, and on this point, we'll either agree or go to court. There's no waiving that position on my part, and since you're so committed to running these otherwise agreed figures through the 1040 modified accounting method, until you're willing to see the viability of why I'm doing what I'm doing, we'll go to trial, and whether at trial or on appeal, I'll win that issue. There simply is no authority by which I may be compelled to use any particular accounting method.

I'll mention in this context that I recognize your time and effort here is a genuine and sincere effort on your part to resolve these matters, which time, effort and perspective I do genuinely recognize and appreciate. I'm really and truly not trying or intending to be "difficult." What I am doing, though, is insisting that as a fiduciary, I will be allowed to pick my accounting method. And, until my accounting method is made part of the agreed facts, I'm simply not going to agree to any other facts. These figures do not come independently from their accounting method, and until we can agree on both the figures and the accounting method, we'll simply not agree, formally, to either.

Secondly, there is no connection between the COMMISSIONER and the "United States." There is, no doubt, some awareness in your office of the "patriot" position regarding a "strawman." What they don't see yet is that the all caps [⊥ 9] identifiers are capacities recognized in "this state." And, by "this state," I mean the exact same thing that the statutes mean: the territory to

which the jurisdiction extends. It's not Texas. It's the "federal territory." Of that "federal territory," TX is one of the administrative subdivisions. Thus, where the COMMISSIONER may be recognized in "this state," the "United States" is not. We know that instantly by looking at the spelling. And, since the COMMISSIONER and the "United States" are in two completely different "places," both of which are rather mutually exclusive, it follows that there is no possible connection between them. Thus, another point in my favor, which truly is a simple matter of law, is that the COMMISSIONER has no standing to assert the claim asserted. Why? Because the COMMISSIONER is not collecting on behalf of the known beneficiary, namely the "United States." Looked at another way, there is no judicial authority in the country that has the authority to compel a fiduciary to make an unauthorized distribution from a trust. Since the sole beneficiary is the "United States," where the "United States" is not making any claim, I have no obligation to make any distribution. To be compelled to do so would be to be compelled to commit "willful misappropriation," or "embezzlement," however you'd like to label it. That's just to say that even if the accounting, by whatever method, produces a mathematical result that says that an amount is due the "United States," there's not one penny of that amount for which any authority in the country exists to compel me to pay over to the COMMISSIONER, or any of his representatives.

Here's what I expect to happen. I expect the Tax Court will unfile my summary judgment motion, because there are ideas there that the Tax Court simply cannot afford to have as a part of *any* Tax Court proceeding. Should that occur, then I'll give notice of the shift of burden of proof, and identify the "United States" as the beneficiary, identifying that such party needs to come forward and prove not only that it is the beneficiary, but also that I am the fiduciary. As it presently stands, the

"UNITED STATES OF AMERICA" is not a stated or known beneficiary. I'll also likely object to Rule 91. There may be at least one verified statement that I'll submit, which, again, the Tax Court will likely unfile. Given those unfilings, and, thus, the material pre-trial alterations of the Record, I'll take these issues to the 5th Circuit on mandamus, and they will likely contact the Tax Court, who will simply reschedule or otherwise uncalendar the case. Who knows? The 5th Circuit may actually grant the unfiled summary judgment. Regardless of how that develops, what you'll end up with is zero dollars. I don't know how my offer of 2,678 compares with what you're expecting from the modified accounting, but I know how it compares with zero.

At the end of the day, where you've expressed your genuine concern of the matter by going to the extent you have, and which I fully recognize and appreciate, [⊥ 10] I'm genuinely intending to return that favor, and give plenty of notice and time for us to settle out this matter. If we can't settle it by May 14, then between the 17th and 31st, there will likely be some things you've not seen a lot of before, which I expect will produce a pre-trial matter suitable for appellate court involvement, which will likely terminate this Tax Court matter in a rather different way from your past experiences. I've put into writing here a significant part of the basis for what will occur, and whether it makes sense "today," "tomorrow,' or "next week," figuratively speaking, there will be a day where you'll reflect on this and appreciate having received this information well in time to have settled out this matter, thus, the return to you of the same favor I see that you've fully intended to extend to me.

I look forward to hearing from you.

Sincerely,

/s/ John Tello
John Tello

2004 May 12 **KORB's/BENFORD's Formal Rejection of Tello's Settlement Offer [R.E. 89-91]**

[Note: Tello included this letter, and its attachment (copy of cashier's check), as R.E. 89-91 in the mandamus proceeding. [23]]

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
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DIVISION COUNSEL
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(972) 308-7900
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MAY 17 2004

CC:SB:6:TL-19480-02
GABenford

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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[23] **Verification**

Pursuant to 28 U.S.C. § 1746, and under the applicable laws of perjury, I, JOHN TELLO, depose and declare (or certify, verify or state), that I'm at least 21 years of age and that I have personal knowledge of the following facts, which facts are true and correct. The documents contained in these Record Excerpts are the regularly kept business records in my custody or control regarding this matter. Each page is a true and correct copy of the "original," which "original" may be the actual original, a true and correct duplicate or a printout of electronically stored information. The cost figures included are based upon the receipts shown here and do not include costs on appeal.

Executed on June 10, 2004

/s/ John Tello
JOHN TELLO
Declarant

John Tello
P.O. Box 870983
Mesquite, Texas 75187-0983

In re: John Tello and Tamara A. Tello v.
Commissioner Docket No 19480-02

Dear Mr. Tello:

Your letter with enclosures, dated April 26, 2004, addressed to David L. Korb, IRS Chief Counsel, was forwarded to me to take appropriate action.

Your settlement offer "In full settlement of Docket No. 19480-02" is rejected. The amount of your offer and accompanying check, $2,678, is less than the amount of tax, penalties and interest owed based on the information you have presented to date. Furthermore, per your letter dated April 26, 2004, and your oral statements of the same date, your settlement offer is premised on "no use of any 1040 accounting method in this case." Your assertions regarding the method to be used in computing your tax liability are frivolous. Thus, I am returning your check, number 282700, with this letter.

I objected to the "service" on April 26, 2004 of your Motion for Summary Judgment because you demanded that I sign a receipt for the document. The Tax Court Rules do not require that a party sign a receipt to acknowledge receipt of service of papers. Moreover, you had previously provided me a copy of the document by facsimile and I had orally acknowledged receiving it.

If you have any questions, please call me.

Sincerely,

/s/ Gary A. Benford
Gary A. Benford
Area Counsel

Enclosure:
Check No. 282700

2004 May 26 Tello's Objection to TCR 91

UNITED STATES TAX COURT

JOHN TELLO and	§	
TAMARA A. TELLO	§	
Petitioners,	§	
v.	§	Docket No. 19480-02
COMMISSIONER OF	§	
INTERNAL REVENUE,	§	
Respondent.	§	

PETITIONER'S OBJECTION TO RULE 91

Objection

JOHN TELLO ("Petitioner" or "TELLO") objects to Tax Court Rule 91 on the grounds it rather flagrantly violates the public policy of this state.

Discussion

There's value in the condition precedent to discovery activity in Tax Court of at least offering stipulations. But, it's completely antagonistic to everything foundational to this state to purport to *compel* an agreement.

Condition Precedent.

As a policy matter, at least offering stipulations as the condition precedent to engaging in any discovery activity is the best idea on the books. For this reason, as a matter of public policy throughout the territory to which the

jurisdiction extends, the concept of Rule 91 should be adopted into the Federal [⊥ 2] Rules of Civil Procedure. Right now, the "mandatory discovery" on some rather routine items is the general policy, and that may accomplish the same purpose. Also, it may simply be that tax matters are enough different that the "condition precedent" policy can work here, whereas it may not work so well, generally. But it should.

The entire purpose of discovery is to narrow the factual and legal issues for trial, by which exercise, the parties may find value in settlement. Thus, offering up something to be agreed to at least opens up that door. It may confirm how far apart the parties are, at least at the threshold, but the mere concept of proposing a stipulation, of something to be agreed to, mutually, for purposes of establishing evidentiary points, is very difficult to beat as an active policy for formal dispute resolution. And, to prohibit any other discovery until something in the way of agreement on even one substantive point relevant to the specific matter has at least been attempted would support the entire purpose of discovery, in particular, and litigation (dispute resolution), generally.

Compelled agreement.

At the very same time, though, for the Tax Court to *require* "stipulations," to *require* "agreements" on points of evidence, is to purport to have authority to cross into an area that no forum within the territory to which the jurisdiction [⊥ 3] extends has authority to tread. In general, compelled agreements raise issues of competence, trustworthiness and relevance of evidence.

At the very "heart" of the law in this state is the essence of the notion of *voluntary* activity and agreement. It is upon *voluntary* recognition, acknowledge-ment, receipt and acceptance of the "benefit" of the commercial unit number (a/k/a the SSN or EIN), as *voluntarily* applied for, whether via the so-called SS-5 form or some

other form, that the commercial essence of this state functions at all. It is upon *voluntary* use of these commercial unit numbers that the commercial activity in this state is carried on. It is upon the *voluntary* use of 31 U.S.C. § 5103 that any transaction is even recognized in this state. It is upon the *voluntary* use or assertion of a "residence" in this state, with a *voluntary* domicile in "DC," that all kinds of "benefits" flow in this state from the "unlimited trustee" public trust theory entities, both state and federal. And, here, at the height of the *critically* voluntary acts, it is the *voluntary* use of the commercial unit number as a "Taxpayer's ID Number," in the bank's (and other financial institution's) agreements, that one even *voluntarily*, per the "objective standard," becomes a "taxpayer" in the first place, thus defining the term by (commercial) use, without which use the term would remain undefined. *See* IRC § 7701(a)(14). [⊥ 4]

Therefore, it seems to Petitioner to be at the absolute zenith of hypocrisy, and to be a flagrant violation of the public policy of this state, to *compel* an agreement, to do anything, at any time, for any purpose, period, as Rule 91 purports to do. Here are some traditional examples of the problem, viewed from the perspective of evidence. A testamentary expression is not competent or relevant evidence where there is undue influence affecting the testator. *See* 1 PAGE, THE LAW OF WILLS §§ 5.7, 15.11 (rev. 2003). A trust agreement is not competent or relevant evidence of any agreement where there's undue influence affecting the settlor. GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 42 at 434, 44 at 452 and n.16 (rev. 2d. ed. 1984) . [24] In every enactment of UCC § 1-103 is the preservation of the common law and, in particular, the defense of undue influence. Thus, where contractual rights, by themselves, may not be sufficient to make the

[24] As such in the original.

point, here, there is in the UCC a *statutory* right to be free from undue influence ("goods" includes "things in action;" UCC 2-105). *See Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959) (statutory right not to have to continue a "checkoff" agreement after the first year). Thus, in general, language of any agreement formed where the party was subject to undue influence is simply not competent or relevant as evidence. Perhaps the ultimate application of the concept is seen in the criminal context, where guilty [⊥ 5] pleas are set aside, are not competent evidence, are not relevant, where there's undue influence in the formulation of the decision to enter such plea. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966). In sum, pick a context; where undue influence is found, the evidence that follows is incompetent, irrelevant and (thus) inadmissible.

How, then, do *required, compelled* "stipulations," "agreed to" evidentiary points, per Rule 91, survive the challenge of undue influence? They don't. Even in this state, no one may be compelled to agree to anything. Duress, coercion and undue influence are affirmative defenses for a good reason. *See* FED. R. CIV. P. 8(c). To purport to *require* someone to agree to anything is to establish an environment of coercion, duress and/or undue influence. That environment vitiates the competence and relevance of the very "evidence" it purports to create.

> We also have emphasized that jurisdiction may not be grounded on a contract whose terms have been obtained through "fraud, undue influence, or overwhelming bargaining power" and whose application would render litigation "so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S., at 12, 18. *Cf. Fuentes v. Shevin*, 407 U.S. 67, 94-96 (1972); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 329

(1964) (Black, J., dissenting) (jurisdictional rules may not be employed against small consumers so as to "crippl[e] their defense"). Just as the Due Process Clause allows flexibility in ensuring that commercial actors are not effectively "judgment proof" for the consequences of obligations they voluntarily assume in other States, *McGee v. International Life Insurance Co.*, 355 U.S., at 223, so too does it prevent rules that would unfairly enable them to obtain default judgments against unwitting customers. *Cf. United* [⊥ 6] *States v. Rumely*, 345 U.S. 41, 44 (1953) (courts must not be "blind" to what "[a]ll others can see and understand").

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 486 (1985).

From still another context, Petitioner sees very little difference between a state's interest in preventing "in-person" solicitation by ambulance chasing attorneys, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), and a state's interest in preventing a "requirement" that a pro se engage in "stipulations" with an attorney representing the SECRETARY through his delegate, the COMMISSIONER. One difference is that the ambulance chaser at least pretends to take the same side as the would-be client (the other party in the conversation). To address the "communications method" issue raised in these "commercial speech" cases, so as to isolate it, stipulations may be entered into via exchange of letters, faxes, email, phone calls, and the like. So, the difference between "in-person" vis-a-vis "by mail" or other such advertising, *see Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), may fully be accommodated, meaning that the communications method isn't the issue. The issue is the mere thought, regardless of communications method, that by way of a procedural rule, discovery rule or any other form of compulsion, an agency arbitration forum may purport to have authority that no other forum in this

state has, namely authority to compel the parties in the dispute before it to agree to anything, whether facts, law or weather. [⊥ 7]

In *Larsen v. Commissioner*, 765 F.2d 939 (9th Cir. 1985), helpful but not binding in the Fifth Circuit, the court relied, in part, on Rule 91 to justify dismissal of the petition. In what may be characterized as a "church" case, there were certain indicia of lack of cooperation in the discovery process. Thus, while the sanction of dismissal may have been fully appropriate on other grounds, to punish Larsen for refusing to be compelled to agree to "stipulations" is so egregious and in such blatant violation of public policy of this state as to jump off the page. While the end result may very well have been the right one, Rule 91 in no way, shape, manner or form contributed to justifying the result.

In *Miller v. Commissioner*, 654 F.2d 519 (8th Cir. 1981), helpful but not binding in the Fifth Circuit, we find another "church" case, another difficult discovery matter, and another case dismissed, in part, based upon Rule 91. Petitioner's observations about and objections to *Miller* are the same as to *Larsen*. The result in *Miller* may be exactly right, but not due to Rule 91, for it cannot be punishable, much less sanctionable, to refuse to be compelled to agree.

Due Process and Rule 91.

Helpful from *Miller* is also the very brief Due Process analysis. The court raised two points: (1) neutral forum and (2) presentation of merits of case. *Miller*, 654 F.2d at 521. (1) Where the trial court has the duty (not merely discretion) [⊥ 8] to serve the summary judgment motion on the Secretary (via his counsel of Record), *see* Tax Court Rule 121, and where the trial court does not serve the motion or set a deadline for a response, a serious question regarding neutrality is raised. (2) Where the merits of the matter stand before this court as a result of discovery

requested by the SECRETARY, coupled with TELLO's verified answers, and where, based in part upon that discovery, Petitioner is fully entitled to judgment as a matter of law, but where the court fails to rule on the merits, or even serve the motion and set a deadline for a response, there arises a "meaningful access to the forum" problem, and an "opportunity to be heard" problem, thus a "presentation of the merits" problem. The merits are beyond factual dispute, and they favor Petitioner, yet this court has taken no action. That inaction has the practical result of (A) denying the motion and (B) compelling Petitioner to the additional expense of an unnecessary trial.

Mr. Boddie faced a similar problem. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce petitioner not allowed to file his pleadings). Boddie wasn't allowed even to file his paperwork. Here, it's "filed," but to what practical end or purpose? What's the difference between (A) not being allowed to file petitions (and motions), and (B) having the clerk "file" a motion, but then also having the court (or clerk) (actively, i.e, [25] with scienter) *not serve* the motion, thus *not set a* [⊥ 9] *date for a response*, which service and date-setting is, by Tax Court Rule 121, reserved fully as within the discretion of the court? *See also* Tax Court Rule 50. "Allowing" a motion "filed" is pure window dressing where the procedural reality is the equivalent of it's never having been (allowed) "filed" in the first place, which is precisely the problem that Boddie faced. Thus, there are both substantive and procedural Due Process issues here. *Boddie*.

Since substantive and procedural Due Process are statutorily imposed upon the Tax Court and its proceedings, *see* IRC § 7482(a), all of the Due Process jurisprudence applies. Where the Tax Court, by its own

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[25] As such in the original.

rules, announces its reservation of motion-by-motion discretion in each matter, this self-declared level of participation is so high as to raise questions of whether this court is a third party to any case on its docket. And, where this court actually participates on a motion-by-motion basis, does not even serve the summary judgment motion on the SECRETARY, and sets no date for a response, it's rather impossible to say that Petitioner has "meaningful access" to the forum or that Petitioner has had a "meaningful opportunity to be heard." Further, and to tie in Rule 91, it's also rather much impossible for Due Process to be satisfied where the "meaningful opportunity to be heard" is *subject to* a compulsion "to agree." [⊥ 10]

Rule 91–Not the actual basis for the decision.

In *AMERCO & Subsidiaries v. Commissioner*, 96 T.C. 18, 43-44 (1991), this court based its decision, in part, upon Rule 91. However, since the Rules specifically state the discovery may be engaged in where stipulations are at least first attempted, *see* Rule 90, it follows that even the Rules admit and recognize that stipulations are not required, but rather serve merely as a condition precedent to discovery. There simply is no evidentiary value in a refusal to be compelled to agree to something.

If Rule 90 discovery does not supply the basis for the evidence, there is still another route, but it's not Rule 91. Where there is a thing in action as between (deemed) merchants, then proposed and non-objected to terms during the formation stage become terms of the agreement. UCC 2-104 (generic). If the typical commercial 10-day rule is unreasonably short, then the typical litigation rule of 30 days should apply to supply the reasonable time period. Thus, to illustrate by way of generic references (and a presumption of uniformity), where Petitioner has served the summary judgment motion, and where the SECRETARY simply goes silent, then UCC 1-303, with 2-104(c) (or 2-104(3)) and 2-201(b)

(or 2-201(2)) actually form terms of the deal, the agreement, the thing in action. *This* is far more self-consistent with public policy in this state than Rule 91. Thus, [⊥ 11] rather than the outrageous notion of the creation or formation of evidence by way of punishment for refusal *to agree*, there is the far more universally applicable notion in this state of agreement by way of failure to object or failure to make a counter-proposal. *That* evidence of agreement is *not* the result of the refusal to be compelled to agree to something. *That* evidence of agreement is the result of application of the applicable statutory provisions where "object or waive" applies.

End Run of Rule 90.

To use stipulations any other way is to turn them into a Request for Admissions that doesn't have to comply with Rule 90. There simply is a world of difference between (a) refusing to be compelled to agree and (b) "participating" in discovery in such a way as to add unnecessarily to the burden and expense of proof. The former is to be commended and can in absolutely no possible way under the sun be punished. The latter is subject to various forms of discovery oversight remedies. Thus, where the court ordered the parties in *Brod v. Commissioner*, 65 T.C. 948 (1976) to engage in stipulations, the court exceeded its authority, as measured by public policy.

"Admissions" by coerced "agreement" are not "trustworthy."

Finally, regarding the policy of *compelled* "agreements," the "stipulations," while agreed, are not neutral. Each fact will tend to support one side or the other. [⊥ 12] Thus, for the side against whom that fact would work, a "stipulation" is (A) an "admission by party opponent," FED. R. EVID. 801(d)(2), for which each and every enumerated item has a manifestly implied character of *voluntary*, or of *self-initiated*, (B) a "statement against interest," FED. R. EVID. 804(b)(3), if

the presumption of unavailability is satisfied, which statement is admissible only where the specifically stated term of "trustworthiness" is satisfied, or (C) a statement that otherwise qualifies as trustworthy so as to qualify as an exception to hearsay, per FED. R. EVID. 807. Pick a context; undue influence does *not* produce "trustworthy" evidence.

If there's an exception to this line of thought, then it would be found in the notion of representation. Petitioner doubts that even a represented party may be compelled to agree to something, for the policy is the same. However, if it should be the case that the representatives, themselves, have bound themselves, and thus their clients, to these Rules, then the basis for the decisions cited above follows, but not from legitimate public policy, but rather from the limitations inherent in obtaining representation obliged to the outrageous policy of compelled agreements (which policy the Rules, read as a whole, don't really support, anyway). Therefore, since this is about the best that exists for exceptions, and since it doesn't really fly, it follows that the policy of compelled agreements is wholly [⊥ 13] antagonistic to the general public policy found throughout the territory to which the jurisdiction extends.

Stipulations in this case.

The normal process was working fine, and stipulations would have produced viable evidence, but for the SECRETARY's intent to compel Petitioner to use and apply a modified (corrupted) accounting method.

Conclusion

In sum, the public policy of this state is 100% dependent upon *voluntary* agreements. To purport to have the authority to *compel* an agreement, of facts for purposes of *evidence*, no less, is to reach the height of violation and antagonism of the public policy of this state. Since Rule 91 purports to reserve the authority to punish the refusal to agree to evidence, it rather flagrantly

violates this state's public policy. It should be ruled invalid for all purposes, save the genuinely admirable purpose that stipulations serve as a condition precedent to discovery.

Respectfully submitted,

/s/ John Tello
JOHN TELLO
P.O. Box 870983
Mesquite, Texas 75187
(214) 564-9664 [⊥ 14]

Date: *5-26-2004*

CERTIFICATE OF SERVICE

By my signature below, I certify that on this the *26th* day of May, A.D. 2004, I have served, by certified mail, return receipt requested, a true and correct copy of this document on Respondent as follows:

DONALD L. KORB
Chief Counsel
Internal Revenue Service
Department of the Treasury
Washington, DC 20224

GARY A. BENFORD
Area Counsel
Small Business/Self-Employed
4050 Alpha Road,
13th Floor
MC 2000 NWSAT
Dallas, TX 75244-4201

/s/ John Tello
JOHN TELLO

2004 May 26 BENFORD's "Objection" to Tello's summary judgment motion

UNITED STATES TAX COURT

JOHN TELLO and TAMARA A. TELLO, Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

RESPONDENT'S OBJECTION TO PETITIONER JOHN TELLO'S MOTION FOR SUMMARY JUDGMENT

RESPONDENT OBJECTS to the granting of Petitioner John Tello's Motion for Summary Judgment.

IN SUPPORT THEREOF, respondent respectfully states:

1. In his motion at pages 2 and 3, Petitioner John Tello ("Petitioner") refers to seven "undisputed facts." Other than the statement that Petitioner is a taxpayer and may have had a bank account for all the years at issue, the seven "undisputed facts" are simply unsubstantiated allegations, more in the nature of argument than fact.

2. The first six "undisputed facts" even if true, which Respondent disputes, do not provide a basis for the granting of summary judgment. They simply do not establish that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law. See Tax Court Rule 122(b).

3. The seventh "undisputed fact," entitled "Request for Admission," includes subparagraphs, relating to the years 1996, 1997, 1998 and 2000, claiming that

Petitioner's tax liability is

zero for each year. Respondent disputes this "fact" for the reasons set forth below.

4. In his "Request for Admission," Petitioner asserts, without citing any authority, that his unsubstantiated and self- serving responses to Respondent's Request for Admission, alleging that he owes no taxes for the years at issue, resolve all of the issues in his favor. He further asserts that Respondent's Certificates of Official Records for the years 1996, 1997, 1998 and 2000 are evidence that Petitioner's tax liability is zero for each year. In fact, the Certificates of Official Records simply indicate, that for the years 1996, 1997, 1998 and 2000: Petitioner did not file Individual Income Tax Returns (Forms 1040); Respondent created substitutes for returns, determined Petitioner's tax liabilities, and issued notices of deficiency; and no assessments have been made due to the pendency of this case.

5. Respondent prepares a substitute for return when a taxpayer fails to file a return. The substitute for return procedures establish accounts when Respondent anticipates additional activity will take place, such as assessments, payments, and credits. See Corkrey v. Commissioner, 115 T.C. 366 (2000). The copies of Certificates of Official Records attached to Petitioner's Motion for Summary Judgment do not establish that Petitioner owes no tax for the years at issue; rather they simply

establish that the proposed deficiencies have not been assessed, since assessment of the proposed deficiencies is prohibited until the decision of this Court becomes final. See I.R.C. § 6213(a).

6. Genuine issues of material fact exist with respect to the issues remaining in this case, including whether Petitioner: realized gains from the sale or exchange of assets; received interest income, dividends, and early distributions from Individual Retirement Accounts; and is liable for additional tax provided by I.R.C. § 72(t) and penalties provided by I.R.C. §§ 6651(a)(1) and 6654. All of these issues must be resolved with the introduction of testimony and/or documents, and are therefore not ripe for summary adjudication.

7. Petitioner's "Application of Law to Fact" contains two subparagraphs. The first subparagraph, entitled "Unknown Beneficiary Problem," is largely incomprehensible and totally meritless. Petitioner asserts, again without citing any authority, that Respondent carries the burden of presenting evidence of the identity of an "unknown beneficiary," whom Petitioner defines as the "COMMISIONER." [26] Petitioner further asserts that Respondent, the "unknown beneficiary," cannot make a claim on the behalf of the "United States," the known beneficiary. It is well settled, however, that the Commissioner and his delegates have authority to administer the internal

revenue laws. See Lonsdale v. United States, 919 F.2d 1440, 1445-1448 (10th Cir. 1990) [27]

8. The second subparagraph, entitled "No 'Unit of Account' Problem," asserts that Respondent has failed to provide any "competent evidence of any claim." Such assertion ignores the fact that Petitioner has the burden of proof with respect to all of the issues in this case. Tax Court Rule 142(a) (1); Welch v. Helvering, 290 U.S. 111, 115 (1933); I.R.C. § 7491(a). It further ignores the fact

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[26] As such in the original.

[27] No end punctuation in original.

that Respondent has provided Petitioner with numerous documents, including copies of declarations of third parties under penalty of perjury and business records, substantiating Respondent's claims.

9. Petitioner's arguments are a "hodgepodge of unsupported assertions, irrelevant platitudes and legalistic gibberish" similar to those previously rejected by this Court. See Crain v. Commissioner, 737 F.2d 1417, 1418 (5th Cir.. 1984). "... [T]o refute these arguments with somber reasoning and copious citation of precedent ... might suggest that these arguments have some colorable merit. Crain v. Commissioner, supra at 1417. This court should reject Petitioner's arguments as frivolous and without merit.

10. Petitioner's Motion for Summary Judgment is but one more step in his long and continuous attempt to delay these proceedings. See the Affidavit in Support of Respondent's Objection to Petitioner John Tello's Motion for Summary Judgment submitted herewith.

WHEREFORE, it is prayed that Petitioner's Motion for Summary Judgment be denied.

DONALD L. KORB

Chief Counsel
Internal Revenue Service

Date: *5/26/04*

By: */s/ Gary A. Benford*
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[Separate Certificates of Service of May 26, 2004 omitted.]

2004 May 26 BENFORD's Affidavit

UNITED STATES TAX COURT

JOHN TELLO and	)	
TAMARA A. TELLO,	)	
Petitioners,	)	
v.	)	Docket No. 19480-02
COMMISSIONER OF	)	
INTERNAL REVENUE,	)	
Respondent.	)	

AFFIDAVIT IN SUPPORT OF RESPONDENT'S OBJECTION TO PETITIONER JOHN TELLO'S MOTION FOR SUMMARY JUDGMENT

I, Gary A. Benford, under penalty of perjury under the laws of the United States of America, declare as follows:

1. My name is Gary A. Benford. I am over 18 years of age, of sound mind, capable of making this statement and personally acquainted with the facts stated herein.

2. I am employed as Area Counsel (Small Business/ Self- Employed) by the Office of Chief Counsel, Internal Revenue Service, Dallas, Texas. I have been employed by the Office of Chief Counsel in various legal positions since

1978. I have access to business records relating to this case that have been kept in the ordinary course of business of the Internal Revenue Service. The business records include the administrative and legal files associated with this case.

Docket No. 19480-02 2

3. Prior to filing his petition with this court, Petitioner John Tello ("Petitioner") mailed numerous frivolous documents to Respondent, or the Secretary of the Treasury, in connection with the years involved in this case. For example, regarding the taxable year 2000, Petitioner submitted a Notice of Affidavit Statement in Protest of Internal Revenue Code Section 6011, a Notice Of Presentment To Agent, and a Notice Of Default In Affidavit Form. Copies of these documents are attached as **Exhibits A, B, and C,** [28] respectively.

4. I have met with Petitioner on three separate occasions in an attempt to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, to relevant facts and documents. The meetings were held on October 15, 2003, April 23, 2004, and April 26, 2004.

5. On October 15, 2003, I presented Petitioner with a proposed Supplemental Stipulation of Facts. [The stipulation was entitled Supplemental Stipulation of Facts because I had contemplated Petitioner Tamara A. Tello signing a separate Stipulation of Facts. The contemplated act became moot when Petitioner Tamara A. Tello subsequently signed a Stipulation of Settled Issues, resolving her tax liabilities for the years at issue.] Petitioner signed the stipulation, but only after he made numerous hand-written changes and deletions. Among other things, Petitioner would not agree that: his name is John Tello;

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[28] Emphasis in original.

he was born on January 19, 1958; and he made withdrawals from his I.R.A. accounts in 1998 and 2000. As a result of Petitioner's changes and deletions, the stipulation is of minimal value. A copy of the stipulation is attached as **Exhibit D.** [28]

6. By letter dated November 18, 2003, I mailed Petitioner copies of declarations of employees of JB Oxford Company, H&R Block Advisors, and The Northwestern Mutual Life Insurance Company. I also gave Petitioner copies of the documents referred to in each of the declarations, plus copies of additional documents provided by JB Oxford Company. The documents substantiated most of the income items included in the notices of deficiency previously issued to Petitioner, and provided basis (cost) information related to sales of assets held in Petitioner's JB Oxford account. A copy of the letter, less attachments, is attached as **Exhibit E.** [28]

7. On January 12, 2004, I served Respondent's Request for Admission on Petitioner. Other than an additional "net capital gains or losses" computation based on the JB Oxford Company records and a small dividend amount, the request generally set forth the same facts that had been presented in the October 15, 2003 Supplemental Stipulation of Facts.

8. In his Answer to Respondent's Request for Admission, Petitioner admitted, among other things, that he was born on January 19, 1958 and that he made withdrawals from his I.R.A.

accounts in 1998 and 2000. He also signed his answer with the name "John Tello" - presumably abandoning his earlier contention that "John Tello" is not his name.

9. On April 23, 2004, I presented Petitioner with a proposed Stipulation of Settled Issues that would have resolved most, if not all, of the remaining issues in this case other than Petitioner's disputed liability for penalties under I.R.C. §§ 6651(a)(1) and 6654. Petitioner orally agreed to the stipulation but wanted to check with the "County" to determine if he could establish additional real estate taxes paid during 2000. We agreed to meet again on April 26, 2004.

10. On the morning of April 26, 2004, but before our meeting, Petitioner faxed to me a letter dated April 26, 2004. A copy of the letter with enclosures is attached as **Exhibit F**. [28] The pages inexplicably bear a "(TUE)APR 27 2004" date in the upper right hand corner. Included in Petitioner's facsimile transmission was a copy of John Tello's Motion for Summary Judgment.

11. I met with Petitioner on April 26, 2004. He reiterated his position that there would be no stipulations in this case, nor any use of a "1040 accounting method."

12. On May 3, 2004, I mailed Petitioner a letter. The letter expressed my disappointment with Petitioner's continued refusal to enter into any sort of meaningful stipulations. I

enclosed a copy of this Court's opinion in Snyder v. Commissioner, T.C. Memo. 2001-255. A copy of the letter without enclosure is attached as **Exhibit G.** [28]

13. On May 6, 2004, I received a letter from Petitioner dated May 5, 2004. Therein, after setting forth his contentions regarding "the viability of the use of the 1041," Petitioner admits, at page 8, that he doesn't "really expect the Tax Court to cotton to this any more that you will." Petitioner then opines, at page 9, that "the Tax Court will unfile my summary judgment motion, because there are ideas that the Tax Court simply cannot afford to

have as part of any Tax Court proceeding." A copy of the letter is attached as **Exhibit H.** [28]

14. As stated in Respondent's Objection to Petitioner John Tello's Motion for Summary Judgment, Petitioner offers two grounds for granting his request for summary judgment: that his unsubstantiated and self-serving responses, alleging that he owes no taxes for the years at issue, to Respondent's Request for Admission, resolve all of the issues in his favor; and that Respondent's Certificates of Official Records for the years 1996, 1997, 1998 and 2000 are evidence that Respondent proposed Petitioner's tax liability is zero for each year.

15. Respondent has never agreed that Petitioner is entitled to use "the 1041 accounting method." Rather, Respondent believes .

Petitioner's tax liabilities are properly reported on an Individual Income Tax Return, Form 1040.

16. As explained in Respondent's Objection to Petitioner John Tello's Motion for Summary Judgment, Respondent has never proposed that Petitioner's tax liability is zero for each year.

17. Petitioner's failure to prepare and file individual income tax returns, to provide records substantiating his claims, and to address the issues in this case in a meaningful manner, coupled with his assertion of frivolous positions both before and after the commencement of this suit, have unnecessarily delayed Respondent's efforts to determine Petitioner's tax liabilities.

The foregoing facts are known by me to be true. I am competent to testify to such facts, and would so testify if I appeared in Court as a witness at the trial of this matter.

Further, affiant sayeth not.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

5/26/04
Date Executed

/s/ Gary A. Benford
GARY A. BENFORD
AREA COUNSEL
OFFICE OF CHIEF COUNSEL
INTERNAL REVENUE SERVICE

2004 Jun 3 Tello's Reply

[Note: The Tax Court received this on 9 June and KROUPA "unfiled" it as of 15 June 2004, per R.E. 18. In the mandamus proceeding, it's R.E. 92-106. In the appeal, it's R.E. 73-87.]

UNITED STATES TAX COURT

JOHN TELLO and	§	
TAMARA A. TELLO	§	
Petitioners,	§	
v.	§	Docket No. 19480-02
COMMISSIONER OF	§	
INTERNAL REVENUE,	§	
Respondent.	§	

JOHN TELLO'S REPLY REGARDING HIS MOTION FOR SUMMARY JUDGMENT

Perspective

The Secretary has an addiction to the term *frivolous*.

"New opinions are always suspected, and usually opposed, without any other reason but because they are not already common." – John Locke, *Essay on Human Understanding* (1690) (Dedicatory Epistle). "It is one thing to show a man that he is in error, and another to put him in possession of the truth." *Id.*, BOOK IV, Chap. 7, Sec. 11. *See* BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 283a (13th and Centennial ed. 1955).

While there may be any number of topics for which we identify with Pontius Pilot ("What is truth?"), there are also a number of certainties. The popular understanding of those certainties goes through its own trial with its own procedure. The author's name has at least two spellings, and the phrasing has at [⊥ 2] least two variations, but his idea is well stated and is this: "All truth passes through three stages: First, it is ridiculed; Second, it is vigorously opposed; and Third, it is accepted as self-evident." – Arthur Scho[e]penhauer (1788-1860).

"It's not what a man doesn't know that tends to create problems for him in life; it's what he knows that just ain't so." – Will Rogers. Before the world was round, it was square, and one could sail too far and fall off. Before the earth circled the sun, the universe circled the earth. Such is the way of life. Habits are difficult to change, and none is more difficult than the habit of popular thought.

Discussion

Since the Secretary's position presumes into existence things that Petitioner does not consent to and will not concede, and since the Secretary refuses to realize the vast vulnerability of his position, the truth is that the Secretary would rather debate these points than settle this case. The truth is that Petitioner has given the Secretary every opportunity to settle out this matter. The Secretary, too, has tried everything within his understanding of the matter to settle this case.

In general, what the Secretary is not yet willing to

recognize is that the "federal income tax system" is designed around a craftily engineered fiduciary obligation, voluntarily entered into when one commercially self-identifies as a "taxpayer." These days, the vast majority of self-identification transactions occur by providing a "Taxpayer's ID Number" when opening a bank account with a [⊥ 3] financial institution affiliated with the "federal reserve system." Since that transaction occurs in "this state," the "objective standard" applies. That allows the "banking party" schemers to end run the problems of calculated non-disclosure, i.e., fraud on its face, which defense exists in a "place" where the "subjective standard" applies. It's a brilliant scam. Truly brilliant.

At some point, it would be interesting to hear the Secretary's rendition of how a "federal corporation," *see* 28 U.S.C. § 3002(15), also comes equipped with a "taxing power," a power exercised solely by sovereigns, not commercial entities.

Petitioner doesn't contest that he has a bank account. Thus, Petitioner doesn't contest that he (objectively, but unknowingly) self-identified as a "taxpayer" (fiduciary). What Petitioner *does* contest is that the party asserting the "deficiency" claim is, in fact, the identified beneficiary. *See* 31 U.S.C. § 321(d). And, the Secretary still has supplied no evidence that it is, in fact, the "United States," or in any way affiliated with that one and known beneficiary.

Regarding burden of proof, the Secretary's position is misplaced, for it presumes into existence a great many things. For example, the Secretary presumes that there is already proven (1) a trust *res*, (2) a fiduciary, and (3) that the claimant is, in fact, a beneficiary of the trust at issue. Sometime *after* that threshold burden is satisfied, Petitioner has zero problem recognizing that the burden shifts to the fiduciary to prove compliance with the trust agreement. Until then, what Petitioner [⊥ 4] *does* contest,

to the ends of the earth, hence the motion, is that *this* claimant, who asserts that a "deficiency" exists, i.e., that a distribution is due from Petitioner, is, in fact, a known beneficiary of the fiduciary obligation Petitioner (objectively, but unknowingly) set up when he opened his bank account. Thus, while the Secretary's position on placement of the burden is the typical scenario, it's greatly misplaced here, for the Secretary has yet to satisfy its threshold burden.

Further, these brilliant con artists had to create their own "place" where no honest system of weights and measures may be found. Once the convertibility into gold (1933) and silver (1964) ended, so also ended any competent evidence of any "unit of account" regarding *any* transaction in "this state." *See* 31 U.S.C. § 5101.

Attorney as Witness.

> CLIENT-LAWYER RELATIONSHIP
> RULE 3.7 LAWYER AS WITNESS
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9. [⊥ 5]

MODEL RULES OF PROF'L CONDUCT R. 3.17 [29] (2002) ("ABA Rule 3.17" [29]).

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[29] As such in the original.

Advocate-Witness Rule

> [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Id. at cmt. 2.

Respondent's Affidavit is that of the Secretary's attorney of Record ("Benford"). His exasperation is understandable, as is the coloring of perspective that tends to accompany such exasperation. Nevertheless, in addition to its being a bit premature, Benford's Affidavit both resolves issues, based upon what's not there, and adds issues, based on what is there.

What's Not There. There being no evidence to satisfy the Secretary's threshold burden, thus no evidence to rebut Petitioner's evidence and position, summary judgment in favor of Petitioner properly follows.

What Is There. Since the very heart of this matter focuses upon the proper application of the proper foundational legal theory, it's fitting that an ethics rule of equally foundational application now also applies. Benford has fully activated ABA Rule 3.17 [29] by (A) unilaterally and voluntarily establishing himself as a "necessary witness" (1) as a fact witness providing parol evidence on purported [⊥ 6] trade usage that a document, verified by the custodian of records for the Secretary, that says "Balance $0" doesn't really mean "Balance $0," and as a legal expert on the issue of "frivolous" (which would likely be for the court to decide, anyway), thus well

beyond the scope of "custodian of records" ("uncontested") matters, and (2) on matters not limited to proving up attorney's fees and costs of court, as the timing alone establishes, and (B) the fact that Respondent is put to no disadvantage whatsoever by replacing Benford as attorney on this case.

On the issue of "necessary witness," it's a(nother) self-imposed problem, and since Respondent's answer to this motion was not due for at least another week, it follows that time existed to obtain testimony from some other witness, if there were another. Further, since Benford does not actually claim to be the custodian of records, but only that he has access to those records, the suggestion is that he's all the more necessary, the actual custodian somehow being unavailable.

For various reasons, including (1) time is short, (2) there is no practical confusion for the trier of fact between Benford as advocate and Benford as fact and expert witness, and (3) the matters are relevant, just not for summary judgment purposes, Petitioner states that he is not adversely prejudiced by Benford's remaining the Secretary's attorney of record. However, since ABA Rule 3.17 [29] doesn't depend on the existence or absence of prejudice to the other party, this may not be terribly relevant, especially in light of the *shall not* rule. [⊥ 7]

Settlement Discussions are Not Typically Admissible.

While settlement information is certainly relevant for post-judgment purposes, Petitioner objects to the admission of settlement discussions for trial purposes, in general, and with respect to the summary judgment proceeding, in particular, on the grounds of relevance. *See* FED. R. EVID. 408. Respondent has satisfied none of the exceptions for the admissibility of such evidence. Therefore, while Petitioner recognizes and encourages the admissibility of Respondent's Exhibits D, E, F, G and H to the extent each may be proper post-judgment evidence,

generally, Petitioner objects to the admissibility of all these Exhibits, including Exhibits A, B and C, as summary judgment (and trial) evidence.

Reviewing the Affidavit, Petitioner observes and objects as follows:

1. Benford relies on 28 U.S.C. § 1746(1) rather than § 1746(2).
2. Benford does not assert that he is, in fact, the custodian of records; merely that he has access to those regularly kept records.
3. Since Benford offers Exhibits A, B and C as "business records," and since Benford is not the custodian of records, Petitioner objects to the admission of those documents at any time and for all purposes, including post-judgment purposes, for lack of proper foundation, hearsay and relevance.
4. Paragraph 4 is inadmissible per FED. R. EVID. 408.
5. Paragraph 5 is, in part, admissible. That part is the date and the parenthetical [⊥ 8] that documents Benford's statement against interest regarding the existence and timing of the secret settlement agreement with Tamara A. Tello. All else is properly redacted as inadmissible per FED. R. EVID. 408.
6. Also regarding paragraph 5, and alternatively, if those other statements are admissible, they're admissible solely to confess the Secretary's motive, plan, intent or scheme to dictate to Petitioner what are the "agreed" facts in the matter, rather than to negotiate what are the "agreed" facts.
7. Also regarding paragraph 5, Benford offers his opinion on the value of the dictated "stipulations," as modified by negotiations. Such opinion is irrelevant, immaterial and non-responsive to the motion, or to any issue even related to the motion. Alternatively, if

paragraph 5 is admissible, then it's properly limited to establishing the Secretary's motive, plan, intent or scheme to dictate what are the "agreed" facts.

8. Exhibit D is irrelevant. If Exhibit D is admissible at all, it's admissible with respect to Petitioner in his capacity as fiduciary, not individually. To date, Respondent (A) has accepted Petitioner's individual capacity as proper, *see* Tax Court Rule 60, and (B) has never asserted any 100% penalty over against such individual capacity, regarding which *see* IRC § 6672. Thus, if Exhibit D is admissible at all, it is definitely irrelevant to and non-responsive to Petitioner's motion, in particular, but it's actually irrelevant to the case, [⊥ 9] generally. "Value," as with "beauty," is in the eye of the beholder.

9. Paragraph 6 sounds of informal discovery, which is irrelevant to and non-responsive to Petitioner's motion.

10. Exhibit E is irrelevant, generally and non-responsive to Petitioner's motion, in particular.

11. Paragraph 7 sounds of formal discovery, the details of which are irrelevant to and non-responsive to Petitioner's motion. Petitioner also objects to the extent this paragraph purports to summarize additional or other evidence.

12. Paragraph 8 is duplicative, argumentative, irrelevant and speculative.

13. Paragraph 9 sounds of settlement discussion and is inadmissible per FED. R. EVID. 408. Further, if Tax Court Rule 91 is a viable rule, then it's very clear that a "stipulation" is (A) *signed* (B) by *both* parties and (C) *filed* with the court. Therefore, alleged verbal "stipulations" are *prima facie* irrelevant.

14. Paragraph 10 is irrelevant and non-responsive. It's

also settlement discussion, inadmissible per FED. R. EVID. 408.

15. Exhibit F is settlement discussion, irrelevant for summary judgment purposes per FED. R. EVID. 408.

16. Paragraph 11 is inadmissible settlement discussion per FED. R. EVID. 408, and it's non-responsive to the motion.

17. Paragraph 12 is inadmissible settlement discussion per FED. R. EVID. 408. [⊥ 10]

18. Exhibit G is settlement discussion, irrelevant for summary judgment purposes per FED R. EVID. 408, and it's non-responsive to the motion.

19. Paragraph 13, for summary judgment purposes, is inadmissible settlement discussion per FED. R. EVID. 408.

20. Paragraph 14, while at least responsive to the motion, asserts no responsive facts but only reiterates Petitioner's facts (duplicative) and argues Respondent's response to Petitioner's motion (argumentative). Petitioner objects to, and finds quite humorous, the characterizations of "unsubstantiated" and "self-serving" regarding Petitioner's discovery *responses*. Perhaps it's too obvious a matter that Petitioner did not create the Secretary's documents! The Secretary proposed those verified documents by way of Respondent's Request for Admission. Petitioner simply agreed with that much of the verified information presented.

21. Paragraph 15, for summary judgment purposes, is inadmissible settlement discussion per FED. R. EVID. 408. It's also argumentative. It's also non-responsive, for the motion burdens Respondent to fulfill its threshold burden. The accounting method issue is irrelevant until sometime *after* the Secretary fulfills

its threshold burden.

22. Paragraph 16 is inadmissible parol evidence. The verified Exhibits that Respondent submitted to Petitioner for purposes of discovery speak plainly [⊥ 11] for themselves from their respective four corners. If the Secretary doesn't mean "Balance $0" where it verifies "Balance $0" in its self-styled, self-generated, self-created documents for discovery and litigation purposes, then the Secretary may want to consider self-styling, self-generating, self-creating and self-verifying different forms with different language in the future. *Cf.* Respondent's Objection [to Petitioner's motion] pp. 2-3, paragraph 5.

23. Paragraph 17 is at least responsive to the motion, but it's irrelevant. It's also argumentative. It's also not competent summary judgment evidence. Perhaps the Tax Court's Rules on sanctions have changed recently and that the 25+ year habit of thought is still with the previous rules and procedures. Nonetheless, this type of argument is not proper, relevant or competent *trial* evidence. Post-judgment is a different phase.

24. Also regarding paragraph 17, Petitioner objects to Respondent's characterizations of "failure to prepare and file," "failure to provide records," "failure to address the issues," "assertion of frivolous positions," "unnecessarily delayed" and "Petitioner's tax liabilities." They are argumentative, conclusory and improper characterizations. They also presume into existence the very facts that are still very much not in evidence.

25. If paragraphs 5-17 are admissible for any other purpose, that purpose would be limited to showing that from November, 2003, to date, the Secretary's [⊥ 12] entire focus of the case has been with Petitioner, i.e., that Tamara A. Tello is no longer a party (for

purposes of notice, opportunity to be heard, etc.).

Frivolity and Post-judgment Matters.

Pick a definition of *frivolous*. Someone is going to be surprised where the chips created by the "frivolity ax" are actually going to fall, if not in this case, because the transition is still early, then in similar future cases. In this very context, Petitioner draws the court's attention to Respondent's Exhibits F and H, in particular. Even a casual observer should be able to detect the "apples and oranges" difference between Exhibits A, B and C, and Exhibits F and H. Benford's Affidavit confesses recognition of change of approach (from apples to oranges), in paragraph 8, pp. 3-4, and the difference in timing, in paragraph 3, p. 2.

The Affidavit also confesses the Secretary's incessant bad faith, as well as full and replete good faith and full disclosure by Petitioner. The Secretary's bad faith arises, in part, in the perpetual assertion of a presumed authority to compel the use of a particular accounting method.

Regarding Benford's Affidavit paragraph 13, p. 5, *see also* Exhibit H, p. 9, and regarding the notion of habit of thought and the difficulty of change, the tests of learning and of the change that goes with it are now overtly before us. Setting the example, Petitioner has changed his thoughts on the matter. Obviously, change hasn't quite yet taken hold in the Secretary's legal office. (It is very interesting that [⊥ 13] Benford specifically signed for Korb rather than for himself).

Still No Genuine Issue of Material Fact.

As for the facts in Benford's Affidavit, Respondent has failed to establish it's threshold burden. Respondent has further failed to establish how its claim of "deficiency" is supported by any competent evidence of any type, kind, form or nature. Since it is, therefore, impossible for Respondent to establish or prove up any "deficiency," *see*

IRC § 7491, § 6201(d) (to the extent it may apply), and *Portillo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991), to the extent that opinion may apply, the proper remedy is summary judgment in favor of Petitioner.

Regarding Tamara A. Tello

Where the court is still giving notice to and looking for a response from Tamara A. Tello, perhaps subtly asking why it's not a ***Joint*** [30] Motion by Petitioner***s***, [30] it follows that even as of May, 2004, this court has received about as much notice of the settlement between Tamara A. Tello and the Secretary as Petitioner has, namely none. It was a carefully guarded secret that occurred in November, 2003. This is the event Petitioner refers to in his motion to which Benford responds parenthetically in his Affidavit in paragraph 5, p. 2. Petitioner discovered that theretofore secret agreement when he sought formally the severance that had already occurred *de facto*, but which motion this court denied. There truly are two separate cases here. The Secretary has treated them as separate since at least [⊥ 14] October, 2003. Notice to and "meaningful opportunity to be heard" from Tamara A. Tello are, therefore, moot.

Since the Petitioners see these matters so differently, the problem is *not* with the separate treatment or with the existence of a separate agreement. No heartburn there whatsoever. The aroma arises from the secret nature of that agreement.

As this litigation properly moves into post-judgment where evidence for sanctions for bad faith, frivolous arguments and vexatious addition to the costs of litigation are admissible, Petitioner intends to discuss this entire matter with this court. For now, since Benford has confessed the secret agreement generally (another matter for which there is no genuine issue of material fact), it

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[30] Emphasis in original.

suffices to mention that this court's form concept of "service" (i.e., no "proof" of service required) can sure be "convenient" sometimes. No doubt it's a rare occurrence within the Office of the Chief Counsel when it's taken advantage of, but it happens, and it happened here.

Continuance is still open.

If these various matters are worthy of additional pre-trial time, then still available for granting is Petitioner's recent motion for continuance.

Relief Requested

Petitioner reiterates his request that this court enter final judgment in his favor for all Fiduciary Years at issue that Respondent take nothing.

Respectfully submitted,

/s/ John Tello
John Tello
P.O. Box 870983
Mesquite, Texas 75187

Date: *6-3-2004*

CERTIFICATE OF SERVICE

By my signature below, I certify that on this the *3rd* day of June, 2004, that I served a true and correct copy of this document on Respondent as follows:

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